Australian Competition & Consumer Commission

# Draft Determination

## Application for Authorisation

lodged by

**Health Purchasing Victoria**

**in respect of**

**Agreements between HPV and Victorian public health services for the exclusive award of tender to nursing agencies**

**Date: 27 June 2002**

**Authorisation no:** A90811
A90812

**Commissioners:**
Fels
Bhojani
Jones
Martin

**File no:** C2002/527

# Summary

On 3 December 2001, Health Purchasing Victoria (HPV) lodged applications A90811 and A90812 with the Commission. The applications were made under subsection 88 (1) of the *Trade Practices Act* 1974 (the Act) for authorisation to make or give effect to a contract, arrangement, or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the *Trade Practices Act* 1974 and make or give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of the TPA. Amendments to the applications were made on 16 January 2002, and 9 April 2002.

HPV is a statutory authority empowered by the *Health Services Act* (Vic) 1988 (Health Services Act) to enter into contracts on behalf of one or more health services, and to direct public hospitals as to the suppliers, prices and terms of trade that they will use to obtain their required goods and services. One of the functions of HPV under the Health Services Act is to facilitate the supply of goods and services to health services and other health or related services on the best value terms.

The application seeks authorisation for the calling and awarding of tenders by HPV for the exclusive acquisition of temporary agency nursing staff from nursing agencies on behalf of public health services in metropolitan Melbourne and Geelong. Under the proposed arrangement, health services represented by HPV will be prevented from acquiring agency nursing staff from competitors of the successful tenderer(s).

HPV argued that Victorian public health services are heavily reliant on private nursing agencies to meet their nursing staff needs with temporary (short term or long term) nursing staff which has led to significant staffing cost increases for health services.

The original intention of the proposed arrangements was to reduce the overall nurse staffing costs for the participating health services and to reduce the administrative costs of negotiating the provision of agency nursing staff by encouraging prospective tenderers to offer their lowest agency nurse wage rate and commission fees in exchange for an exclusive supply arrangement.

However, on 1 March 2002, the Victorian Department of Human Services (DHS) issued a written direction under section 42 of the Health Services Act capping the rate which Victorian public hospitals and metropolitan health services can pay for agency nursing services and limiting the instances in which agency nurses can be employed to unexpected absences of permanent staff.

In effect, the written direction appears to be intended to produce the outcomes the proposed tender process was designed to achieve.

The Commission has assessed the likely public benefits and effects on competition of the proposed tender process, given that the written direction is already in place, having regard for the fact that any benefit or detriment resulting from the written direction will result irrespective of whether authorisation is granted to the proposed tender arrangements.

In the context where this written direction is already in place, the Commission considers any anti competitive detriment resulting from the proposed tender arrangements in addition to that which would other wise flow from the written direction to be minimal.

The Commission considers that a small public benefit will flow from the arrangements in the form of administrative cost savings generated by the arrangements which could be expected to be direct towards improving patient care. The Commission also considers that the requirement that the successful tenderer meet service level targets would assist in improving patient care.

The Commission therefore concludes that the public benefits likely to result from the arrangements would outweigh any anti-competitive detriment that may arise. Accordingly, the Commission proposes, subject to any request for a pre-decision conference, to grant authorisation in relation to applications A90811 and A90812. Authorisation is proposed to be granted for 5 years.

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# 1. Introduction

1.1 Organisations that engage, or propose to engage, in certain anti-competitive business arrangements or conduct that could breach the TPA, may apply to the Australian Competition and Consumer Commission (the Commission) for authorisation of such arrangements or conduct.

1.2 If granted, authorisation provides immunity from legal action under the TPA in respect of the arrangements or conduct.

**Authorisation process**

1.3 Upon receiving an application for authorisation, the Commission invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

1.4 The Commission then issues a draft determination in writing, proposing either to grant the application (in whole, in part, or subject to conditions) or deny the application. In preparing a draft determination, the Commission will take into account any submissions received from interested parties.

1.5 Once a draft determination is released, the applicant or any interested party may request that the Commission hold a conference to discuss its operation and effect. The Commission will also usually invite interested parties to lodge written submissions on the draft.

1.6 The Commission then reconsiders the application, taking into account the comments made at the conference (if one is requested) and any further submissions received, and issues a written final determination.

**Statutory test**

1.7 Under sub-section 90 (6) of the TPA, the Commission may grant authorisation to a proposed contract, arrangement or understanding if it is satisfied that:

- the contract, arrangement or understanding would be likely to result in a benefit to the public; and
- this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.

1.8 The Commission must assess the public detriment flowing from the anti-competitive aspects of the arrangements and the public benefits arising from the arrangements. The two must then be weighed to determine which is the greater. If the public benefit outweighs the public detriment, the Commission may grant authorisation. If not, authorisation will be denied. However, in some cases, it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

## The Applicant[1]

1.9 HPV is a statutory authority empowered by the Health Services Act to enter into contracts on behalf of Victorian health services, and to direct public hospitals as to the suppliers, prices and terms of trade that they will use to obtain their required goods and services.

1.10 The HPV Board is comprised of representatives from metropolitan health services, rural public hospitals, the Victorian Department of Human Services (DHS) and the Victorian Department of Treasury and Finance. The Board is responsible for the award of contracts, following the submission of a recommendation from the Tender Manager.

1.11 One of the functions of HPV under the Health Services Act is to facilitate the supply of goods and services to health services on the best value terms.

1.12 HPV selects the goods and services which public hospitals should purchase. HPV's Product Reference Groups evaluate goods and services to determine which should be selected. The Product Reference Groups consult with hospitals and draw on clinical and supply expertise in reaching their decision.

1.13 Once HPV has contracted with the supplier of the goods or services, public hospitals are required to purchase those goods or services in accordance with the HPV contract, unless they are party to a pre-existing contract governing the same subject. In addition, if there are particular clinical or other circumstances, a hospital may be exempt from the HPV contract and will be able to purchase from its own preferred supplier.

## The Application

1.14 On 3 December 2001, HPV lodged applications A90811 and A90812 with the Commission under subsection 88 (1) of the TPA.[2]

1.15 Application A90811 sought authorisation to make or give effect to a contract, arrangement, or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.

1.16 Application A90812 sought authorisation to make or give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of the TPA.

1.17 Broadly, authorisation is sought for the calling and awarding of a tender by HPV for the exclusive acquisition of temporary agency nursing staff on behalf of public health services in metropolitan Melbourne and Geelong. The health services are listed at Appendix A. The application is described in greater detail in Chapter 3 of this draft determination.

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[1] The following information about HPV is sourced from the HPV website at www.hpv.org.au, and from the HPV submission.

[2] The applications have also been considered as applications under the Victorian Competition Code.

**Interim Authorisation**

1.18 At the time of lodging the application, the Applicant requested interim authorisation for the proposed arrangements.

1.19 On 24 January 2002, the Commission denied HPV's request for interim authorisation. In denying HPV's request for interim authorisation the Commission noted that it was not satisfied that HPV was able to demonstrate an urgent need for protection from the TPA. Nor was the Commission satisfied that the market would be able to return to its pre-interim authorisation state if the Commission later denied full authorisation.

# 2. Background to the industry[3]

## Nursing in Australia

2.1 There were 257 662 nurses registered in Australia in 1999.[4] Of these, 233 096 were working in the nursing labour force.[5]

2.2 There were 69 811 nurses registered in Victoria in 1998.[6] Of these, it was estimated that 56 350 nurses were working in the Victorian nursing labour force; 38 146 were employed in the public health system.[7]

2.3 Nurses are employed in a variety of clinical areas in the public and private sectors, and may work in a range of settings including hospitals, clinics, schools or the community. Hospital employment is the largest category of employment.

2.4 Most hospital nurses are permanently employed by hospitals. Additional staffing requirements (ie as a result of sick leave) are met by the engagement of casual nurses. Hospitals acquire casual nurses from two sources:

- Internal nursing banks of hospital employees; and
- External nursing agencies.

2.5 In 2000, the Victorian Government appointed the Nurse Recruitment and Retention Committee (the NRCC) to examine issues relating to the recruitment and retention of registered nurses in Victoria. In its final report, issued in May 2001, the NRCC suggested that nurses may prefer agency positions to permanent hospital positions for the following reasons:

- Agency pay rates may be higher than permanent pay rates;
- Agencies are able to offer nurses regular preferred shifts, allowing nurses greater flexibility (particularly with regard to family responsibilities); and
- Nurses employed by agencies are able to work in a clinical setting without the burden of administrative duties that falls on permanent staff.

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[3] Much of the information in this section is sourced from: Department of Education, Science and Training *National Review of Nursing Education: Discussion Paper*, 2001; Victorian Government Department of Human Services, *Nurse Recruitment and Retention Committee – Final report*, 2001; and Victorian Government Department of Human Services, *Nurse Labourforce Projections Victoria 1998 – 2009*, 1999.

[4] Australian Institute of Health and Welfare, *Nursing Labour Force 1999*, National Health Labour Force Series No 20, 2001, p 7. This figure has been adjusted to accommodate those nurses who are registered in more than one state or territory.

[5] Australian Institute of Health and Welfare, *Nursing Labour Force 1999*, National Health Labour Force Series No 20, 2001, p 7.

[6] *Nurse Labourforce Projections Victoria 1998 – 2009*, p 7.

[7] *Nurse Labourforce Projections Victoria 1998 – 2009*, p 9

## Nursing Shortage

2.6 A number of reviews of the nursing profession have identified a shortage of nurses, both in Victoria and nationwide.

2.7 In March 1999, the Victorian Department of Human Services (DHS) released a study of the Victorian nursing labour force that included ten-year projections of the demand for, and supply of, nurses in Victoria. The study projected that if current levels of demand for health services are maintained, Victoria will face a shortfall of 5500 registered nurses by 2008.

2.8 The NRCC's final report stated that "[t]here is widespread support for the view that there are insufficient nurses staffing the Victorian public health care system."[8]

2.9 The current certified agreement between nurses and hospitals in Victoria is based on the recommendations made by the Australian Industrial Relations Commission (the AIRC) in its August 2000 decision in *Victorian Hospitals' Industrial Association v Australian Nursing Federation.*[9] In that decision, the AIRC described the shortage of nurses in Victoria as "a crisis in nurse recruitment and retention and workload."[10]

2.10 In April 2001, the then Commonwealth Ministers for Education, Training and Youth Affairs and for Health and Aged Care jointly announced the National Review of Nursing Education (the National Review). The National Review was called to examine the relationship between the education of nurses and the nursing labour market and make recommendations on:

- models of nurse education and training;
- the types of skills and knowledge required to meet the changing needs of the nursing labour force; and
- mechanisms for attracting new recruits and encouraging the commitment to lifelong learning of those already engaged in nursing.

2.11 The National Review identified a shortage of nurses in Australia, and noted that this shortage seemed likely to continue given:

- the persistency of the shortage;
- the fall in enrolments in nursing courses; and
- the international shortage of nurses.

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[8] *Nurse Recruitment and Retention Committee – Final report*, 2001, p 1.
[9] 31 August 2000.
[10] *Victorian Hospitals' Industrial Association v Australian Nursing Federation*, 31 August 2000 at paragraph 144.

2.12 The National Review also identified other factors likely to impact upon future demand in the nursing workforce including:

- the ageing of the nursing workforce; and
- the increase in the proportion of part-time to full-time nurses.

2.13 The Commonwealth Department of Workplace Relations and Small Business provided data to the National Review that indicated that there was a shortage of nurses in Victoria in 16 of 21 specialised areas, including oncology, accident/emergency, aged care, critical/intensive care and palliative care.

**Nursing Agency Services in Victoria**

2.14 Agency nurses represent 3.3% of the nurses working in the Victorian public health system, and 2.4% of the nurses working in the Victorian private health system.[11] In addition, nurses employed by public hospitals may choose to work extra shifts for agencies.

2.15 The agencies identified by HPV as those currently providing nursing services to the Victorian public and private health sectors are listed in Appendix A.

2.16 In the past, agency nurses have been employed to cover unplanned absences of permanent staff. Evidence presented to the NRCC suggested that the use of agency nurses had increased significantly in recent years

2.17 The NRCC noted that it has been suggested that agency nurses are now being used to fill permanent vacancies, as hospitals are pressured to keep beds open in order to maintain their level of funding.

2.18 Hospitals and nurses told the NRCC that the increase in the use of agency nurses has been largely due to the inability of hospitals to recruit sufficient nurses to permanent positions.

2.19 The NRCC further reported that the use of agency nurses can be problematic, for reasons including the following:

- agency nurses may be unfamiliar with the unit, requiring orientation and additional supervision from permanent staff;
- agency nurses may not have the qualifications or level of experience necessary to the unit;
- the difference in pay rates for agency and permanent staff is seen as a destabilising factor by many nurses; and

[11] *Nurse Labourforce Projections Victoria 1998 – 2009,* p 15.

- there are concerns over the sustainability of the comparatively high remuneration rates for agency nurses.

2.20 The NRCC recommended, among other things, that the use of agency nurses be restricted to unplanned absences only. The NRCC further recommended that strategies be implemented to ensure that permanent vacancies are filled by permanent staff and that health facilities are encouraged to (re)establish internal banks of casual nursing staff to cover unplanned absences.

2.21 In its response to the NRCC report of May 2001, the Victorian government noted that the recommendation that agency nurses only be used to cover unexpected vacancies had been overtaken by the AIRC's decision in *Victorian Hospitals' Industrial Association v Australian Nursing Federation.*

2.22 In that case, the Victorian Hospitals' Industrial Association notified the AIRC of an industrial dispute with the Australian Nursing Federation over the negotiation of a new certified agreement. Issues of contention between the parties revolved around workloads, particularly in regard to the desirable nurse/patient ratio, and pay rates. The parties agreed that the AIRC's recommendations would form the basis of a three-year, multi-employer, certified agreement.

2.23 The AIRC recommended that employers should endeavour to meet the optimal nurse/patient ratio through the employment of permanent staff, and that agency nurses should only be used to cover unexpected absences. However, the AIRC was not prepared to strictly limit the use of agency nurses in this way, believing that to do so would be restrictive and unlikely to address the staffing problem.

**Health service response to rising nursing costs – application for authorisation**

2.24 The NRCC reported that individual health services have attempted to contain the remuneration levels of agency nurses through preferred provider contract arrangements. However, these efforts and the corresponding concern about the sustainability of the agency remuneration levels have had little effect.

2.25 As indicated in Chapter 1 of this draft determination, on 3 December 2001, HPV lodged applications seeking authorisation for the calling and awarding of tenders by HPV for the exclusive acquisition of temporary agency nursing staff from nursing agencies on behalf of specified public health services in Victoria. HPV also requested interim authorisation for the proposed arrangements (see paragraph 1.18-19).

*HPV's supporting submission*

2.26 HPV submitted that there is a shortage of qualified nursing staff in Australia that are willing or available to be employed directly by hospitals (both public and private) and health services must, in general, top up approximately 5% of their nursing staff requirements from other sources. HPV noted that the reliance on agency nurses differs between different service types. For example, sometimes up to 50% of nurses staffing emergency wards are agency nurses.

2.27 HPV contended that employee nurses who are interested in working overtime tend to register with nursing agencies rather than making themselves available to the health service's internal nurse bank, as they can obtain significantly higher wages for the same shifts. HPV further contended that due to the higher income available, some nurses also opt to reduce the total number of shifts they are prepared to work, resulting in an overall reduction in labour available.

2.28 HPV submitted that Victorian public health services are therefore heavily reliant on private nursing agencies to meet their nursing staff needs with temporary (short term or long term) nursing staff, which has resulted in the growth of the nursing agency market.

2.29 HPV contended that this reliance on nursing agencies has led to significant staffing cost increases for health services. In addition, the government has not increased its funding of health services to accommodate these increases in staffing costs. Therefore, HPV contended that any additional costs incurred by a health service in the acquisition of nursing staff at rates in excess of the relevant Industrial Award (Award) or Enterprise Bargaining Agreement (EBA) rates must be funded from other areas within the health service, potentially resulting in bed closures. Whilst health services have managed to fund the increased costs to date, HPV contended this cannot continue in the long term.

2.30 The purpose of the tender is to encourage the prospective tenderers to offer their lowest agency nurse wage rates and commission fee in exchange for an exclusive supply arrangement, in an attempt to reduce the overall nurse staffing costs for the participating health services and to reduce the administrative costs of negotiating the provision of agency nursing staff.

**Chronology of the application**

2.31 The Commission wrote to interested parties on 10 December 2001, inviting comments on the public benefits and anti competitive detriment of the proposed arrangements. The Commission set a deadline for submissions of 15 February 2002. The submissions received are outlined in Chapter 5 of this draft determination.

2.32 On 16 January 2002, HPV amended its application to reflect its intention that the health services would be required by HPV to appoint HPV as their agent and to exclusively acquire their agency nursing staff from the successful tenderer(s) (as described in paragraph 3.6).

*The written direction*

2.33 On 1 March 2002, the DHS issued a direction under section 42 of the Health Services Act. The direction regulates the maximum price which Victorian public hospitals and metropolitan health services can pay for agency nursing services, and the conditions under which agency nursing services may be used.

2.34 The written direction provides that all public hospitals, metropolitan health services, and multi-purpose services identified in Schedules 1 – 3 of the Health

Services Act must engage nursing agency staff in accordance with the following:

- agency nurses must only be used to cover unexpected absences (such as sick leave);
- where an agency nurse performs tasks that would otherwise be performed by a permanent employee, the agency nurse must be engaged and paid at the same grade as the permanent employee;
- nurses who are permanently employed by a health service must not be engaged to perform agency nursing services for the health service by which they are permanently employed;
- the amount paid to an agency for the services of a temporary nurse must not be more than 80% above the basic award rate, and any allowance provision included in the award must not be exceeded by more than $15.

*Amended application in light of section 42 written direction*

2.35 Following the issue of the direction by the DHS, HPV made further amendments to its applications on 9 April 2002. HPV amended the tender documents (as lodged with the applications for authorisation and subsequently amended on 16 January 2002) so as to ensure consistency with the conditions of engagement of agency nurses set out in the DHS direction.

2.36 The Commission wrote to HPV on 22 April 2002, noting that many of the public benefits and anti competitive detriment identified by HPV and by interested parties in submissions received to date by the Commission would appear to flow, possibly to a large degree, from the written direction issued by DHS, irrespective of whether authorisation is granted for the proposed tender arrangements. The Commission therefore sought HPV's views on the likely additional public benefits and effects on competition of the proposed tender process as amended, given that the written direction was already in place.

2.37 The Commission also wrote to interested parties on 22 April 2002, inviting comments on the public benefits and anti competitive detriment of the amended applications. The Commission set a deadline for submissions of 3 May 2002. The submissions received are outlined in Chapter 5 of this draft determination.

2.38 The Commission received a submission from the DHS on 21 May 2002. The DHS submission is outlined in chapter 5 of this draft determination. The DHS commented on the direction, noting that the direction was issued because the Victorian public health system required immediate action to address the problems associated with the use of agency nurses.

2.39 The DHS further submitted that it considered the direction to be a short-term measure and that its strategy for the management of agency nursing services includes both the DHS direction and HPV's proposed tender arrangement.

2.40 The Commission wrote to the DHS on 28 May 2002, seeking clarification of whether it was DHS's intention that the written direction would remain in place for the duration of any contracts awarded under the proposed tender process.

2.41 On 17 June 2002, the DHS confirmed that it did not intend to rescind the direction in the event that authorisation was granted to the proposed tender arrangements.

# 3. The Application

3.1 HPV proposes to call and award the tender for agency nursing services on behalf of the health services listed at Appendix B under s 132 (2) (b) of the Health Services Act.

3.2 On 9 April 2002, HPV amended the tender documents lodged with the original application to ensure consistency with the conditions of engagement of agency nurses set out in the DHS direction.

3.3 Tenderers will be requested to tender for:

- the rates which they will pay to the agency nurses if over the Award/EBA rate, according to days/times worked, classifications/grade, clinical specialities and clinical areas;

- the commission fee for the provision of agency nurses. The commission fee will be a flat fee which will include administrative costs, overheads, payments for statutory requirements such as Workcover and superannuation etc, and profit. Preference may be given to tenderers who state this fee as a flat charge per shift worked. However, tenders stating fees as a percentage of the total or some defined part of the payment made to staff may be considered. Fees in the format of a flat fee for some stated components plus a percentage charge for other components will also be considered; and

- any discount for volume or early payment which is offered.

3.4 The successful tenderer(s) will be appointed based on various criteria, including:

- ability to meet the Health Services' operational needs;

- overall price rates and ultimate cost to the Health Services, including any discounts;

- tenderer's willingness to pay nurses the relevant Industrial Award or Enterprise Bargaining Agreement rate;

- ability to provide consistent and reliable services;

- financial viability;

- workforce capabilities and the tenderer's key personnel who will be devoted to providing the services;

- past experience and current work;

- responsiveness of services;

- operational stability;

- depth and strength of management;
- a commitment to support all reasonable requests made by Health Services personnel;
- relevant quality management, risk management, industrial relations and occupational health and safety policies and standards;
- references provided by tenderer; and
- acceptance of terms and conditions of the Service Agreement.

3.5 HPV will then enter into agreements, on behalf of the health services, with the successful tenderer(s) for the provision of agency nurses at the tendered amount.

3.6 It is intended that the tender will be exclusive, so that the health services will only acquire agency services from the successful tenderer(s). To facilitate the exclusive nature of the tender, it is proposed that HPV give a written direction under section 132(2)(c) of the Health Services Act requiring each health service (other than the Sisters of Charity Health Service) to acquire all their agency nursing staff requirements exclusively from the successful tenderer(s). The Sisters of Charity will enter into an agreement with HPV to exclusively acquire such staff from the successful tenderer(s).

# 4. Submissions

**Submissions in relation to the initial applications**

4.1 A list of submissions in relation to the initial applications is at Appendix C.

4.2 HPV argued the following public benefits in relation to its original applications:

- decreased staffing costs;
- employment equity and workplace harmonisation;
- price certainty;
- reduced bargaining imbalance and promotion of equitable dealings;
- increased nursing staff availability/alleviation of nursing supply shortage;
- fostering of business efficiency;
- improved quality of patient care; and
- increased range of services offered by health services.

4.3 Interested parties opposed to the original applications argued that:

- the arrangements will not generate the cost savings claimed;
- the arrangements will not generate greater workplace harmony, foster business efficiency, or improve quality of patient care;
- reduced wages will exacerbate the current nursing supply shortage by leading to further nurses exiting the market;
- HPV's claims regarding the costs of employing agency nurses are extreme examples;
- agencies add to the total pool of nurses by attracting nurses who would not otherwise be able to remain in or enter the profession;
- the existing rates of pay reflect the underlying costs of providing temporary staff and the current supply shortage; and
- the expansion of the market for agency nurses is a consequence of, not the cause of, the nursing shortage.

**Amended applications**

4.4 As noted above, on 1 March 2002 the DHS issued a direction under section 42 of the Health Services Act. The direction regulates the maximum price which Victorian public hospitals and metropolitan health services can pay for agency nursing services, and the conditions under which agency nursing services may be used.

4.5 Following the issue of the direction by the DHS, HPV made further amendments to the application on 9 April 2002. HPV amended the tender documents, as lodged with the application for authorisation and subsequently amended on 16 January 2002, so as to ensure consistency with the conditions of engagement of agency nurses set out in the DHS direction.

**Submissions in relation to the amended (9 April 2002) applications**

4.6 A list of submissions in relation to the amended applications is at Appendix D.

4.7 The DHS argued the following public benefits in relation to the amended applications:

- competition in the nurse agency industry will be maintained;
- a panel for nurse agencies that meets the necessary requirements will allow for ongoing supply of agency nurses;
- the items contained in the DHS direction will be consolidated into a contract;
- the arrangements will establish performance targets for the agencies (such as with regard to the qualifications and skills of the nurses provided);
- the arrangements will provide for price reviews;
- the arrangements will provide a mechanism for assessing demand, which will assist future planning;
- the arrangements will create and formalise transparency in dealings between the health services and the agencies; and
- the establishment of regular performance reports.

4.8 Interested parties argued the following in relation to the amended applications.

4.9 Several interested parties submitted that the proposed tender arrangements will decrease competition between nursing agencies as agencies not selected to the panel to supply public hospital will be forced to close down without this public sector access. It was argued that the proposed arrangements would be to the particular detriment of smaller agencies that would not have the ability to meet the conditions and requirements of the proposed tender.

4.10 Interested parties argued that unsuccessful tenders would be excluded from approximately 70% of the public sector market and, consequently, would be unable to maintain a viable pool of nurses as nurses willing to make themselves available for agency work would leave the nursing pool of the unsuccessful tenderers and join the successful tenderer's agency. Interested parties argued that the successful tenderers would then be in a position to monopolise the casual nursing labour force.

4.11 Some interested parties argued that while some industry rationalisation my be desirable, there is a danger that the proposed arrangements will alter the structure of the market, encouraging merger and acquisition activity, creating a small group of oligopolistic agencies.

4.12 Interested parties also noted that to the extent that agencies become commercially unviable as a consequence of not being able to supply nurses to public hospitals, the market for acquisition of nurses by private hospitals will also be adversely affected.

# 5. Commission Evaluation

### Future with and without test

5.1 In order to identify and measure the public benefit and anti competitive detriment generated by conduct proposed to be authorised, the Commission applies the "future with-and-without test" that was first established by the Australian Competition Tribunal.[12] This requires a comparison of the public benefit and public detriment that the proposed conduct would generate in the future if the authorisation is granted with the position if the authorisation is not granted. The situation without the authorisation is termed the counterfactual.

5.2 The counterfactual which the Commission has applied in assessing the proposed collective tender process is one where, in the absence of the tender process, the public health services party to the proposed arrangements would negotiate individually with agencies for the supply of temporary nursing staff.

### Section 42 written direction

5.3 The original intention of the proposed collective tender process was to encourage prospective tenderers to offer their lowest agency nurse wage rate and commission fees in exchange for an exclusive supply arrangement in order to reduce the overall nurse staffing costs for the participating health services and to reduce the administrative costs of negotiating the provision of agency nursing staff.

5.4 As noted in paragraphs 2.33 –2.34, the DHS issued a written direction under section 42 of the Health Services Act on 1 March 2002 which, among other things, capped the rate at which Victorian public hospitals and metropolitan health services can pay for agency nursing services.

5.5 The aim of this aspect of the DHS written agreement is essentially the same as the original aim of the applications for authorisation; that is, to reduce nursing agency costs.

5.6 Many submissions to the Commission from interested parties in relation to the proposed tender arrangements where highly critical of the written direction issued by the DHS.

5.7 However, HPV has not sought authorisation for the DHS written direction (indeed, the direction would fall outside the scope of the authorisation process as it constitutes government regulation of the market rather than potentially anti-competitive conduct by market participants). The Commission is therefore not assessing whether the public benefit generated by the written direction outweighs any associated public detriment.

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[12] See, for example, *Re Australasian Performing Rights Association* (1999) ATPR 41-701.

5.8 Having said this, the Commission has evaluated the proposed tender arrangements in the context where the DHS written direction is, and as indicated by the DHS, will continue to remain, in place.

5.9 In this respect, the Commission notes that many of the public benefits and anti competitive detriments identified by the applicant and by interested parties in submissions received prior to the issuing of the written direction (as summarised in paragraphs 4.2 and 4.3) now flow as a consequence of the written direction irrespective of whether authorisation is granted for the proposed tender arrangements.

5.10 Broadly, the Commission is now assessing the public benefit and detriment that would be generated by the proposed collective tender process over and above that generated by the DHS written direction. The result is that many of the arguments made in submissions lodged before the written direction was made are now irrelevant to the assessment of the application for authorisation.

**The relevant market**

5.11 Public benefits and detriments arising from the conduct sought to be authorised are assessed in the context of a market. In assessing an application for authorisation, and applying the relevant public benefit test, the Commission is not required to form a view as to whether the conduct is likely to breach the Act. Therefore, in the authorisation context, it is only necessary to delineate the relevant market to the extent needed to assess the public benefits and detriments of the proposed conduct.

5.12 The Commission considers the relevant market for the purposes of considering the current application is likely to be the market for the supply of nursing services to public and private health care providers within Victoria.

5.13 The supply of casual nurses to health services (public and private) by nursing agencies is likely to be a sub-market of the market for the supply of nursing services more generally.

**Anti-competitive detriment**

5.14 Anti-competitive detriment could potentially result from the proposed tender arrangements if the proposed tender arrangements:

- lead to a reduction in the long term supply of nursing services; or
- reduce the number agencies able to supply the sub-market for casual nurses.

*Reduction in long term supply of nurses*

5.15 In most circumstances, a reduction in remuneration paid to a trained professional would be likely to reduce the long-term supply of labour in that profession. Broadly, trained professionals are likely to be slow in leaving the profession, given the training they have undertaken to enter it in the first place. However, people outside the profession may, over the longer term, be deterred

from entering the profession if they consider that the remuneration they would receive would be inadequate.

5.16 To the extent that the proposed tender arrangements would reduce the level of supply to a nursing market already suffering from a shortage of supply, the Commission considers that this would constitute a public detriment as such shortages would inevitably compromise the quality of patient care.

5.17 As noted above, the section 42 written direction has capped remuneration for agency nurses in public hospitals at the relevant award rate plus 80 per cent. However, the collective tendering process might result in agencies tendering below this rate. To the extent that this occurs, this may further reduce the agency nursing remuneration, with potential consequences for supply of nurses in the longer term.

5.18 In this respect, the Commission notes that:

- presumably, in issuing the written direction the DHS has set the maximum price which public hospitals can pay agency nurses at the lowest level it considers is commercially feasible for nursing agencies - therefore tender bids significantly lower than the price regulated under the DHS direction are unlikely;

- several nursing agencies have submitted that, given their cost structures, it would not be possible for them to tender at or below the written direction rate; and

- agencies may choose to reduce the fee that they receive, rather than casual nursing remuneration, to achieve a tender bid below the written direction price cap.

5.19 These factors seem to suggest that it would be unlikely that the tender would reduce casual nursing remuneration significantly below the written direction cap.

5.20 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. The section 42 written direction would have reduced this percentage further (by limiting the employment of agency nurses to unexpected absences). It would therefore seem unlikely that a possibly small change in remuneration in this very small sector of the market would result in a significant change in the longer term supply of nurses.

*Possible reduction in number of nursing agencies*

5.21 Only those nursing agencies successful in the tender process will be able to supply agency nurses to participating health services. This raises the prospect that a proportion of the unsuccessful tenderers may become unviable and leave the market.

5.22 This could potentially result in higher prices for casual nursing staff for those health services not party to the proposed arrangements (predominantly private hospitals) which would have fewer agencies from which to source casual nursing staff. Additionally, participating health services would have fewer agencies from which to source casual nursing staff once contracts entered into under the initial tender process expire, which could then mean that they face higher casual nursing costs.[13]

5.23 However, on the basis of the information before it, the Commission considers this an unlikely outcome.

5.24 The section 42 written direction provides that health services may only engage agency nurses to cover unexpected absences by permanent staff. Previously, the Commission understands that agency nurses could be engaged in a considerably wider range of circumstances. Essentially, the written direction appears to have substantially reduced the demand for agency nurses by public hospitals. This could be expected, over time, to reduce, possibly significantly, the number of nursing agencies in the market. In particular, less efficient nursing agencies are likely to leave the market or possibly merge.

5.25 In addition, should all the health services listed as potential parties to the proposed tender elect to participate in the arrangements this would constitute approximately 70 per cent of the public sector demand for nursing services. In turn, total public sector demand for nursing services constitutes approximately 67 per cent[14] of total demand for nursing services. The proposed parties to the arrangements therefore constitute approximately 50 per cent of the total demand for nursing services in Victoria.

5.26 Consequently, a significant proportion of the market would seem likely to remain open to nursing agencies that were unsuccessful in the proposed collective tender process.

5.27 On the information available to the Commission, it is not clear that this proportion of the market would not be sufficient to sustain a significant proportion of those nursing agencies following the section 42 written direction.

5.28 In any case, to the extent that the proposed tender arrangements do further reduce the number of nursing agencies, there appear to be low barriers to agencies re-entering the market for the provision of casual nursing staff. Consequently, should agencies in the market attempt to increase the fees for their services to hospitals (as opposed to casual nursing remuneration), then new agencies could be expected to enter the market offering lower fees.

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[13] Alternatively, if the participating health services obtained authorisation to re tender for nursing agency services, there could potentially be fewer nursing agencies to participate in the tender process, resulting in a higher tender price.

[14] Victorian Government Department of Human Services, *Nurse Labourforce Projections Victoria 1998 – 2009*, 1999.

5.29 In this respect, the Commission understands that many nursing agencies are in fact divisions of larger recruitment agencies which provide temporary staff across a number of industries. If these nursing agencies left the market as a result of the proposed tender process, they would seem to be in a position to quickly re-enter if commercial opportunities arose.

5.30 In addition, hospitals could rely more on nursing banks to supply their casual nursing requirements.

*Conclusion on public detriment*

5.31 Overall, the Commission considers it likely that the anti-competitive detriment generated by the proposed collective tender process would be minimal.

**Public benefit**

5.32 The Commission is satisfied that the administrative costs incurred by participating health services in dealing with nursing agencies are likely to be lower under the collective tender process than they would be if participating health services dealt with nursing agencies individually. The value of this cost saving would seem to be increased in relative terms given that, under the section 42 written direction, agency nurses may only be engaged for unexpected absences, which would be likely to reduce the demand for agency nurses, possibly significantly.

5.33 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. This would constitute a small public benefit.

5.34 The Commission is also satisfied that the requirement that the successful tenderer meet service level targets (for example, in relation to the provision of nurses within specified turnaround times and the quality and skills of nurses) would assist in improving the quality of nursing services, and thereby the quality of patient care. This would also constitute a small public benefit.

*Conclusion on public benefit*

5.35 The Commission considers it likely that the proposed collective tender process would generate a small public benefit.

**Conclusion**

5.36 The Commission considers that the public benefit likely to be generated by the proposed tender process, while small, would outweigh any associated public detriment.

5.37 The Commission notes that contracts entered into under the proposed tender arrangements will be for a duration of three years with health services having the option of extending the agreement for a further two years. The Commission therefore proposes to grant authorisation for the following period:

- for the period of the tender process up to a maximum of nine months; and
- for the term of the contract up to a maximum of five years.

5.38 As noted above, the Commission has considered these applications in the context where the written direction issued by the DHS is, and will continue to be, in place.

5.39 Having proceeded on the basis that the written direction will remain in place, as indicated to the Commission by the DHS, if the direction is subsequently revoked, this may constitute a material change of circumstance.

# 6. Draft Determination

6.1 For the reasons outlined in Chapter 5 of this draft determination, the Commission concludes that in all the circumstances the arrangements for which authorisation is sought:

- are likely to result in a benefit to the public; and
- the benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

6.2 The Commission therefore proposes, subject to any pre-determination conference requested pursuant to s 90A of the TPA, to grant authorisation to applications A90811 and A90812.

6.3 The Commission proposes to grant authorisation for the following period:

- for the period of the collective tender process up to a maximum of nine months; and
- for the term of contracts entered into under the tender process up to a maximum of five years.

# Appendix A: List of agencies currently providing nurses to public and private health services in Victoria

The following is a list of agencies currently providing nurses to public and private health services in Victoria. The list was compiled by HPV.

- Alpha
- AustraHealth
- Australian Nursing Solutions
- Belmore
- Code Blue
- Colbrow
- Critical Solutions
- Macedon
- Malvern Nursing Agency
- Melbourne Nursing Agency
- Nurse Bank Australia
- Nursing Australia (comprised of eight agencies owned by the Staffing Australia Group)
- PCC
- Peninsula
- Prime
- PRM
- Time Critical
- Twin Hills.

Nursing Australia is comprised of the following agencies:

- Ace Nursing Agency
- Care Nursing Agency
- Clinical Nurse Specialists
- Clover Nurses Agency
- Gordon
- Medihealth Mental Health Specialists
- Teamwork
- Western Nursing Agency

# Appendix B: List of health services on whose behalf HPV proposes to tender

The following is the list of health services (and their sites) on whose behalf HPV proposes to tender for the provision of temporary staff from nursing agencies.

- **Melbourne Health**
  The Royal Melbourne Hospital
  Melbourne Extended Care and Rehabilitation Services at:
    Cyril Jewel House (East Keilor)
    Boyne Russell House (Brunswick)
    Parkville Hostel on MECCRS site
  Melbourne Mental Health
  Melbourne Health Dialysis Centres at:
    RMH
    Sunshine
    Broadmeadows

- **Western Health**
  Western Hospital
  Sunshine Hospital
  Williamstown Hospital
  Reg Geary Nursing Home
  Hazeldean Nursing Home
  Drug & Alcohol Services

- **Northern Health**
  The Northern Hospital
  Broadmeadows Health Service
  Bundoora Extended Care Centre

- **Austin & Repatriation Medical Centre**
  Austin Campus
  Repatriation Campus
  Royal Talbot Campus
  Satellite Dialysis Services
  Community Psychiatry Centres

- **Royal Victorian Eye & Ear Hospital**
  East Melbourne
  RVEEH at Broadmeadows Health Service
  RVEEH at Maroondah Hospital

- **Peter McCallum Cancer Institute**
  East Melbourne Campus
  Box Hill Campus
  Moorabbin Campus

- **Bayside Health**
  The Alfred Hospital
  Caulfield General Medical Centre
  Sandringham Hospital

- **Eastern Health**
  Box Hill Hospital
  Maroondah Hospital
  Peter James Centre
  Yarra Ranges Health Service
  Angliss Health Service

- **Southern Health**
  Monash Medical Centre – Clayton
  Monash Medical Centre – Moorabbin
  Dandenong Hospital
  Kingston Centre
  Hampton Hospital
  Berwick Hospital (from 2004)

- **Peninsula Health**
  Frankston Hospital
  Rosebud Hospital
  Mt Eliza Geriatric Hospital

- **Dental Health Services Victoria**
  Royal Dental Hospital of Melbourne

- **Women's & Children's Health**
  Royal Women's Hospital
  Royal Children's Hospital
  Adolescent Forensic Health Service
  Travancore Mental Health Service
  Young Peoples Health Service

- **Sisters of Charity Health Service**
  St Vincent's Hospital Melbourne
  St George's Health Service
  Caritas Christi Hospice
    Fitzroy
    Kew

- **Barwon Health**
  Geelong Hospital
  Grace MacKellar Centre

# Appendix C: Submissions in relation to the initial applications

The following is a list of submissions received by the Commission in relation to the initial applications and placed on its public register.

- Belmore Nurses Bureau
- Colbrow Nurses Agency
- Victorian Nurse Specialists
- Access Nurses Agency
- Austin & Repatriation Medical Centre
- Recruitment & Consulting Services Association
- J.P.Sesto & Co
- Twin Hills Nurses Agency
- Malvern Nurses Agency
- Australian Nurses Federation
- Eastern Health
- Australian Medical Recruitment
- Alpha Nursing
- Barwon Health
- Nursing Australia
- Critical Solutions
- Australian Nursing Agency
- AustraHealth
- Women & Children's Health
- Southern Health
- Code Blue Specialist Nursing Agency
- The Alfred
- Rodney J Hancock
- Nursing Australia
- Anne Mordey
- Peter MacCallum Cancer Institute
- Oxley Group
- Middletons Lawyers
- Nursing Australia
- Drake Medox
- Belmore Nurses Bureau
- Belmore Nurses Bureau (additional)
- Victorian Nurse Specialists
- Alpha Nursing

- Recruitment and Consulting Services Association
- Nursing Agency of Australia
- AustraHealth
- J.P.Sesto & Co
- Peninsular Health
- Critical Solutions
- Medistaff International
- Malvern Nurses Agency
- Nursing Australia
- Psychiatric Care Consultants
- Nursing Agency Australia
- Southside Nurses
- JMB Jobnet
- Staffing Synergy
- Eastern Suburbs Nursing Service
- Help Agency
- Nursing Excellence
- Nursing Agencies Association of Australia
- Colbrow Nurse Agency
- Code Blue Specialist Nursing Agency

In addition to those submissions listed here, the Commission also received a number of confidential submissions which are not publicly available and not listed here. The Commission also received several hundred submissions from individual nurses, predominantly in the form of form letters opposing the applications, which are not listed here. However, these submissions have been placed on the Commission's public register.

# Appendix D: Submissions in relation to the amended applications

The following is a list of submissions received by the Commission in relation to the amended applications and placed on its public register.

- Howard Tetley
- Alpha Nursing
- Southern Health
- Chris Hutton
- J.P.Sesto & Co
- Womens and Childrens Health
- Code Blue Specialist Nurses
- IRC Global Networks
- Belmore Nurses Bureau
- Victorian Nurse Specialists
- Nursing Agencies Association of Australia
- Critical Care Clinicians Association
- The Alfred
- Colbrow Nurses Agency
- Recruitment and Consulting Services Association
- Medistaff International
- AustraHealth
- Department of Human Services

In addition to those submissions listed here, the Commission also received a number of confidential submissions which are not publicly available and not listed here.