Conclusion on public detriment

6.56 For the reasons outlined above, the Commission considers it likely that the anti-competitive detriment generated by the proposed collective tender process to be minimal. In particular, the Commission does not consider that the proposed tender arrangements will lead to a significant reduction in the long term supply of nursing services; or significantly reduce the number of agencies able to supply the sub-market for casual nurses below the levels which will result as a consequence of the DHS direction.

Public benefit

Administrative cost savings

6.57 In its draft determination the Commission considered 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.

6.58 The Commission considered that 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 which would constitute a public benefit.

Issues arising out of the draft determination

6.59 Several nursing agencies questioned whether the administrative cost savings claimed would flow from the proposed tender arrangements.

6.60 HPV argued that the tender process would lead to a streamlining and reduction in administrative costs incurred by participating health services in dealing with nursing agencies. HPV noted that at present there are approximately 60 nursing agencies and therefore 60 agreements/sets of arrangements and that the tender process would reduce the administrative costs involved in managing this.

6.61 Several area health services also noted that there were significant administrative costs, time and effort involved in managing different relationships with a wide range of agencies and that streamlining this process through the proposed tender arrangements would generate cost savings.

Commission evaluation

6.62 While the precise extent of administrative cost savings that may be generated by the proposed arrangements is difficult to quantify, 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.

6.63 In particular, the Commission notes the problems faced by many smaller hospitals in utilising agency nurses. For example, the Peter MacCallum Cancer

Institute submitted that because of its size it does not have the budget or staff to deal with the administrative burden created by having to deal with a large number of agencies.

6.64 More generally, the Commission notes that currently, each metropolitan public health services is required to deal with up to 60 different agencies in sourcing its temporary nursing staffing needs. While it is unlikely that the proposed tender arrangements will significantly reduce the total number of agencies with which each hospital deals, they will streamline this process by establishing a common set of rules and conditions for all agencies rather than requiring hospitals to negotiate with each agency individual.

6.65 Further, the Commission notes that at present, not only do hospitals have to negotiate with a variety of different agencies, but that this negotiation occurs on an ongoing basis as the terms and conditions, and particularly rates, offered by any individual agency vary over time, sometimes from week to week.

6.66 Therefore, the proposed tender arrangements will not only alleviate individual hospitals of the need to negotiate individually with each nursing agency, but, by establishing a common set of rules and conditions for a three to five year period, alleviate the need for ongoing renegotiation of terms, conditions and rates, as currently occurs.

6.67 While difficult to quantify in absolute terms, the value of this cost saving would seem to be increased in relative terms given that, under the DHS direction, agency nurses may only be engaged for unexpected absences, which has reduce the demand for agency nurses significantly.

6.68 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 public benefit.

Service standards

6.69 In its draft determination the Commission considered that the requirement that the successful tenderers 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 which would constitute a small public benefit.

Issues arising out of the draft determination

6.70 HPV and health services contended that the proposed tender is an important means by which it will be ensured that agency nurses are subject to quality assurance processes through requiring that the service standards specified in the tender documents are actively demonstrated.

6.71 Some nursing agencies contended that there is no evidence to suggest that the quality of service which is currently being provided by nursing agencies is any less than that required under the proposed tender arrangements. In contrast,

other agencies argued that the proposed services standards would be unattainable.

6.72 Code Blue argued that there has been no explanation as to why health services acting individually cannot seek to impose service standards.

Commission evaluation

6.73 Any means of improving the quality of nursing service, and thereby patient care, would constitute an obvious benefit to the public. However, in this instance, the Commission has not received any evidence to suggest the current quality of patient care provided by agency nurses is in any way deficient. However, HPV has argued that the proposed arrangements will ensure that services standards, and thereby quality of patient care is maintained, which it argues, constitutes a public benefit in itself.

6.74 The Commission notes that there are currently approximately 60 nursing agencies supplying services to the proposed health services party to the tender arrangements. Given the number of agencies it can be expected that the quality of service provided is likely to vary across agencies. The proposed tender arrangements will ensure that a common benchmark standard of service is achieved by all agencies and agency nurses supplied to the metropolitan Melbourne public health system.

6.75 The Commission notes Code Blues argument that there is nothing to prevent health services acting individually to seek to impose services standards. Beyond the additional administrative cost involved in health services seeking to unilaterally establish service standards, as discussed above, a common set of service standards across the metropolitan public health system is likely to benefit both hospitals, and agencies, which might otherwise be required to meet a wide variety of different service standard levels in supplying different hospitals.

6.76 Further, a common set of standards across the metropolitan public health system, established through the proposed tender arrangements, is more likely to be enforceable and maintained than if health services sought to unilaterally impose such standards.

6.77 However, as noted above, the Commission has received no evidence to suggest the standard of service currently provided by agencies and agency nurses is in any way deficient. Therefore, while the Commission considers that there is some public benefit in ensuring that such standards are maintained in the future, the Commission considers this public benefit to be small.

Introducing consistency and certainty to the nursing agency/hospital relationship

6.78 HPV contended that the proposed tender system is aimed at strengthening and enhancing the relationships between agency nurses and health services, which will ultimately be to the overall benefit of the public health system generally. HPV stated that the tender process is aimed at removing uncertainties in the employment relationship between health services and agency nurses, and

introducing administrative consistency between the procedures of the various participating health services.

6.79 Health services noted that there are differences in the manner in which hospitals deal with nursing agencies, and the terms under which agency nurses are engaged, across health services and that the proposed tender arrangements are a means of standardising these practices and managing the complexities of having a number of hospitals within an area health service dealing with a number of different agencies under different conditions.

6.80 The Peter MacCallum Cancer Institute noted that it has had problems with nursing agencies in the past where they were not able to give a commitment that nurses would turn up for shift. The Peter MacCallum Cancer Institute stated that often agency nurses were booked only for them to not show up or for the booking to be cancelled. It stated that it hoped that the tender arrangements would address this problem.

6.81 Bayside Health also expressed the desire that the introduction of standards and consistency through the proposed tender arrangements would result in improved communication between nursing agencies and health services.

6.82 The NAAA contended that a competitive tender process that can accommodate the needs of individual health services is already in place, and that a one size fits all tender arrangement across the industry is inappropriate.

6.83 Code Blue Specialist Nursing Agency (Code Blue) stated that most agencies already work harmoniously with health services and that HPV was exaggerating discrepancies between agencies that did not exist.

Commission evaluation

6.84 The Commission considers that the proposed tender arrangements will remove uncertainties in the employment relationship between health services and agency nurses, and introduce administrative consistency between the procedures of the various participating health services which would constitute a benefit to the public. However, the Commission considered that any public benefit likely to flow from introducing administrative consistency to the nursing agency/hospital relationship is accounted for through the administrative cost savings discussed above.

6.85 The Commission notes the concerns raised by the Peter MacCallum Cancer Institute about agency nurses being booked for, and not turning up for, shifts, thereby leaving hospitals short staffed.

6.86 As noted above, given the nature of the service being provided, health services need to be reasonably assured that if a nursing agency has committed to provide a nurse for a particular shift, that one will be supplied. The Commission understands that hospitals have had problems in the past with agencies committing nurses to shifts only for those nurses to cancel, or more problematically, not arrive without informing the hospital. To the extent that this does occur, it has the potential to compromise the efficient delivery of

health services which would be to the detriment of both the hospital and the public more generally.

6.87 The Commission considers that the proposed arrangements, through formalising the relationship between nursing agencies and hospitals, and through the provision for penalties to be imposed if agencies do not supply a nurse for a shift for which they have committed to do so, should address this problem, thereby improving quality of patient care. This would constitute a benefit to the public.

6.88 The NAAA has argued that a one size fits all approach across health services party to the proposed arrangements is inappropriate. The Commission notes that the health services themselves are supportive of the proposed arrangements indicating that they consider the proposed arrangements suitably flexible to address their individual needs.

Conclusion on public benefit

6.89 For the reasons outlined above, the Commission considers it likely that the proposed collective tender process would generate some, limited, public benefit. In particular, the Commission considers that the proposed tender arrangements will result in some administrative cost savings to health services, which are likely to be directed to improving the quality of patient care. Additionally, the Commission considers that the proposed arrangements will generate some, small, public benefit through the requirement that successful tenders adhere to service level targets, and through ensuring that once a nursing agency has committed to providing a nurse for a shift, one will be available, which will assist in improving the quality of patient care.

Specific clauses of the Services Agreement

6.90 A number of nursing agencies raised concerns that some clauses of the Services Agreement do not provide sufficient detail as to what agencies obligations would be under the Services Agreement. For example Clause 3.6 of the Services Agreement requires that contractors conform with performance indicators set out in schedule 4 of the Services Agreement. However, schedule 4 of the Services Agreement has not been provided at this point in time.

6.91 HPV noted that it provided the Services Agreement for indicative purposes only. HPV stated that it was always its intention that the details of the terms of the Services Agreements would be determined following consultation and discussion with a service reference group consisting of representatives of the health services which propose to participate in the proposed arrangements.

6.92 Further, HPV contended that it intends to adopt a consultative and cooperative approach to developing service targets, with the terms of the Services Agreement being subject to negotiation with the successful tenderers. HPV contended that this will enable the various stakeholders to put forward their views with regard to issues such as the conditions and terms of employment of

agency nurses by the participating health services. Specifically, HPV stated that if authorisation is granted there will be at least one, possibly more, industry forums on the tender process so that issues such as service levels agreements could be worked through with the agencies prior to the tender arrangements being implemented.

6.93 The Commission notes that the tender documentation provided by HPV as part of its application for authorisation may be subject to change if authorisation is granted. This issue is addressed in paragraphs 6.137 – 6.140.

Clause 6.1 – Contractor cannot supply (and Health Services will not accept) nursing services from a person who is currently a member of the Health Service's permanent staff.

6.94 A number of interested parties questioned why it was necessary for HPV to prevent nursing staff being employed as an agency nurse at the same hospital at which they are employed in a full time capacity.

6.95 HPV noted that Clause 6.1 is consistent with the third condition stipulated in the DHS direction. HPV argued that this clause is necessary to maintain consistency between the DHS direction and the proposed tender arrangements.

Commission evaluation

6.96 The Commission notes that clause 6.1 of the services agreement is consistent with the third condition of the DHS direction. Therefore, nursing agencies and health services would be required to abide by the letter of this clause irrespective of whether it was included in the tender document, by virtue of its inclusion in the DHS direction.

6.97 As noted above, the Commission must consider the proposed tender arrangements in the context where the DHS direction is, and as stated by the DHS, will remain, in place having regard only to those public benefits and public detriments which may be generated by the proposed tender arrangements in that context.

6.98 Given that the provision that a contractor cannot supply (and health services will not accept) nursing services from a person who is currently a member of the health service's permanent staff is a provision of the DHS direction, any public benefit or detriment from this provision will flow irrespective of whether such a clause is also included in the Services Agreement.

6.99 The Commission therefore considers that the inclusion of this clause in the Services Agreement does not in itself generate any detriment to nursing agencies, agency nurses, or the public.

Clause 8.1 – Liability of nursing agencies for damage or loss resulting from the actions of agency nurses.

6.100 Several interested parties 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 noted 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.

6.101 HPV confirmed to the Commission that the intent of clauses 8.1.3 and 8.1.4 of the Services Agreement was not to place upon nursing agencies liability for any act or injury beyond that directly or indirectly resulting from the actions of the agency or agency nurse.

6.102 HPV noted that it is willing to amend, by way of a condition of authorisation, these clauses to provide that the Contractor's liability to indemnify a health service in such cases is limited to acts or injury caused directly or indirectly as a result of the actions of the agency or agency nurse in question.

Commission evaluation

6.103 The Commission considers that as currently drafted, there is some ambiguity under clause 8.1 as to the liability of nursing agencies for acts causing damage or injury in health services. Taken literally, one interpretation of clause 8.1 could be that 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. As confirmed by HPV, this is not the intent of the clause.

6.104 The Commission has therefore imposed a condition of authorisation that clause 8.1 of the Services Agreement be amended to clarify that the liability of nursing agencies in this context is limited to acts or injury caused directly or in directly as a result of the actions of the agency or agency nurse in question.

C2: A new sub clause (8.1.6) must be inserted into the Services Agreement to read "The Contractor's liability to indemnify a Health Service in respect of clause 8.1 is limited to acts or injury caused directly or indirectly as a result of the actions of the Contractor or persons engaged by the Contractor in the provision of the services by or on behalf of the Contractor under this document".

Clause 9.2 – Specific insurance obligations

6.105 Several nursing agencies expressed concerns that insurance of the type required under this clause is not currently available to them in the market.

6.106 HPV stated that it was aware of a number of suppliers of the types of insurance required by this clause. HPV also stated that it understood that the ANF had engaged an insurance broker to determine the existence of insurers to cover such insurance and it had found four such insurance providers.

Commission evaluation

6.107 While not in a position to asses the availability of insurance coverage of the type required by this clause to nursing agencies, the Commission would be

concerned if such insurance coverage was not available. To the extent that such coverage is difficult to obtain, this may place onerous obligations on agencies participating in the proposed tender arrangements.

6.108 However, having noted that, if nursing agencies are unable to obtain insurance coverage of the type required by this clause then essentially the clause would become unenforceable. Indeed, if agencies were unable to tender for the provision of temporary nursing services to health services by virtue of being unable to comply with this clause, this would be as much a detriment to HPV and the health services as it would be to the nursing agencies.

6.109 The Commission notes HPV's intention to engage in further consultation with successful tenders before finalising the details of the Services Agreement. Should it become apparent that insurance coverage of the type required by this clause is not readily available to nursing agencies then HPV will need to amend this clause to ensure that the services were in fact tendered for.

Clause 9.2.4

6.110 Clause 9.2.4 of the Services Agreement 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 (VMIA), on behalf of the health services. Nursing agencies expressed concerns that they do not have access details of this coverage.

6.111 HPV stated that it intends to request that VMIA make this specific information available for inclusion with the tender documentation. The Commission considers that provision of this information will address this concern.

Clause 9.2.6

6.112 Clause 9.2.6 of the Services Agreement 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. Interested parties 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.

6.113 HPV argued that clause 9.2.6 was inserted in the Services Agreement because the health services' insurance contract with VMIA requires that a clause of this nature is included in every Services Agreement entered into by a health service. However, HPV indicated that it was prepared, by way of a condition of authorisation, to have clause 9.2.6 deleted from the Services Agreement.

Commission evaluation

6.114 Ostensibly it would appear that 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 is properly the responsibility of the relevant hospital or health service. Indeed, it appears that requiring nursing

agencies to provide such indemnity would be requiring them to indemnify against injury or damage outside of their and their agency nurses control. The Commission does not consider that HPV has provided any justification for such an obligation to be imposed on nursing agencies. The Commission has therefore imposed a condition of authorisation that clause 9.2.6 be deleted from the Services Agreement.

C3: Clause 9.2.6 must be deleted from the Services Agreement.

Clause 10.2 – Fees payable by nursing agencies to nurses

6.115 Clause 10.2 of the Services Agreement specifies the maximum fee payable by nursing agencies to their nursing staff. Nursing agencies submitted that this is an unnecessary provision within the scope of the proposed arrangements, which concern the fees payable to nursing agencies by health services. They contend that provided agency nurses are provided to health services at the agreed rate, any arrangement between the nursing agencies and its nurses regarding their remuneration is a matter solely between the parties.

6.116 HPV stated that it does not intend that the Services Agreement regulate the relationship between nurses and their agency. However, HPV noted that clause 10.2 of the Services Agreement would appear to regulate the amount payable directly to a nurse, as opposed to the amount payable to the nursing agency. HPV stated that clause 10.2 has been drafted entirely on the basis of condition 2 of the DHS direction and was necessary to maintain consistency between the DHS direction and the proposed tender arrangements.

Commission evaluation

6.117 The Commission considers, as it would appear do both nursing agencies and HPV, that any arrangement between the nursing agencies and its nurses regarding their remuneration is a matter solely between the parties. The Commission does not consider that there is any justification for HPV seeking to regulate such arrangements.

6.118 However, the Commission notes that clause 10.2 of the services agreement is consistent with the second condition of the DHS direction. Therefore, nursing agencies and health services would be required to abide by the letter of this clause irrespective of whether it was included in the tender document, by virtue of its inclusion in the DHS direction.

6.119 As noted above, the Commission must consider the proposed tender arrangements in the context where the DHS direction is, and as stated by the DHS, will remain, in place having regard only to those public benefits and public detriments which may be generated by the proposed arrangements in that context.

6.120 Given that the provision that an agency nurse supplied by an agency to perform nursing services that would otherwise be performed by a permanently employed nurse must be engaged and paid at the same grade as the permanently employed nurse is a provision of the DHS direction, any public benefit or detriment from

this provision will flow irrespective of whether such a clause is also included in the Services Agreement.

6.121 The Commission therefore considers that the inclusion of this clause in the services agreement does not in itself generate any detriment to nursing agencies, agency nurses, or the public.

Clause 13.3 – Recovery of costs by health services

6.122 Clause 13.3 of the Services Agreement 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.

6.123 Nursing agencies contend that this requirement is particularly onerous (to the point of unconscionability within the meaning of section 51AC of the TPA) and will exclude smaller agencies, who could otherwise work within the DHS direction, from responding to or working within the tender. In respect of the financial penalties for non-supply, the RCSA contended that agencies have limited or no control over when nurses make themselves available or cancel out of shifts.

6.124 The Commission wrote to HPV seeking clarification of how it was intended that this clause would operate. HPV responded that it is its intention to ascertain these issues once practical issues such as the number of agencies on the panel have been determined.

6.125 HPV did indicate the way in which it is proposed at this time that the clause will operate. HPV stated that it is intended that an agency will only be liable to pay to a health service the difference in cost between the agreed contract price for providing a nurse and the actual amount paid by the health service in sourcing a nurse from elsewhere, in the event that there is confirmation that a particular nursing agency has committed to supplying a nurse for a particular shift and then fails to do so.

6.126 HPV contended that the clause is simply intended to operate as an optional means of recovering any costs which a health service might face in having to find a nurse to fill a shift which an agency on the panel has already confirmed it would be able to provide a nurse for. HPV considered the clause, when applied in this manner, a standard term which would be likely to appear in any commercial agreement of this nature.

Commission evaluation

6.127 The Commission considers that clause 13.3 as currently drafted could place onerous requirements on successful tenderers. Specifically, as currently drafted, the clause does not specify the circumstances in which health services may

recover the cost of involved in procuring the services of an agency nurse from an alternative source if a contracted agency is unable to provide that nurses.

6.128 As acknowledge by HPV, it is not intended that clause 13.3 operate in this manner. Rather HPV contend that an agency will only be liable to pay to a Health Service the difference in cost between the agreed contract price for providing a nurse and the actual amount paid by the Health Service in sourcing a nurse from elsewhere, in the event that there is confirmation that a particular nursing agency has committed to supplying a nurse for a particular shift and then fails to do so. The Commission has imposed a condition of authorisation requiring that clause 13.3 be amended to reflect this intent.

6.129 The Commission notes the concerns of the RCSA that agencies have limited or no control over when individual nurses cancel out on shifts. However, the Commission does not consider that this is sufficient justification for an agency to avoid its responsibility to supply a nurse for a particular shift once a specific commitment to supply a nurse for that shift has been made.

6.130 Given the nature of the service being provided, health services need to be reasonably assured that if a nursing agency has committed to provide a nurse for a particular shift, that one will be supplied. The Commission understands that hospitals have had problems in the past with agencies committing nurses to shifts only for those nurses to cancel, or more problematically, not arrive without informing the hospital. To the extent that this does occur, it has the potential to compromise the efficient delivery of health services which would be to the detriment of both the hospital and the public more generally.

6.131 The Commission considers that clause 13.3, subject to the condition below, provides hospitals with assurance that once an agency has committed to provide a nurse for a specific shift, that a nurse will be provided, without placing onerous obligations on the nursing agency. The Commission considers that as amended by its condition, this clause places no more onerous an obligation on nursing agencies than is the case in many stand commercial contracts for supply of goods or services.

6.132 The Commission further notes that nursing agencies have argued in relation to other elements of the services agreement that any arrangement between a nursing agency and its nurses regarding their employment by the agency is a matter solely between the parties. The Commission considers that principle equally applicable here. Once a nursing agency enters into an agreement with a hospital to supply an agency nurse for a particular shift, the Commission considers that the agency has an obligation to do so. The Commission considers any difficulties between the agency and its nurses in being able to fill that shift, once that commitment to the hospital is made, is a matter between the agency and its nurses.

C4: Clause 13.3 must be amended so as to provide that the cost recovery provisions of this clause are only applicable in the event that there is confirmation that a particular nursing agency has committed to supplying a nurse for a particular shift and then fails to do so. Clause 13.3 must also be

amended so as to provide that the maximum amount which health services may recover from a nursing agency is the difference in cost between the agreed contract price for providing a nurse and the actual amount paid by the Health Service in sourcing that nurse from elsewhere.

Balance of Public Benefit and Public Detriment

6.133 The Commission considers the likely anti-competitive detriment generated by the proposed collective tender process to be minimal. Specifically, the Commission does not consider that the proposed tender arrangements will lead to a significant reduction in the long term supply of nursing services; or significantly reduce the number agencies able to supply the sub-market for casual nurses, below the levels which will result as a consequence of the DHS direction.

6.134 The Commission considers that the proposed collective tender process will generate some, limited, public benefit. The Commission considers that the proposed tender arrangements will result in some administrative cost savings to health services, which are likely to be directed to improving the quality of patient care. Additionally, the Commission considers that the proposed arrangements will generate some, small, public benefit through the requirement that successful tenders adhere to service level targets, and through ensuring that once a nursing agency has committed to providing a nurse for a shift, one will be available, which will also assist in improving the quality of patient care.

6.135 Consequently, following consideration of the arguments advanced by the applicant and interested parties the Commission concludes that the public benefit likely to be generated by the proposed tender process, while small, would outweigh any associated public detriment, subject to certain conditions being complied with.

6.136 The Commission does not consider that these conditions of authorisation change the nature of the arrangements for which authorisation is sought, but clarify the intent and effect of the tender documents which will assist in facilitating the resultant net public benefits of the arrangements.

6.137 The Commission notes that while HPV has sought 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 the public health services party to the arrangements, it has indicated that the tender documents provided to the Commission as part of its application, and subsequently amended, are indicative. HPV has noted that it is its intention that the details of the final terms of the tender documentation will be determined following further consultation and discussion with health services and nursing agencies, and that the tender documentation may change in light of those discussions.

6.138 The authorisation the Commission proposes to grant is based on the indicative tender documentation provided to it for consideration. While these documents may be subject to further amendments based on consultation between HPV, area

health services and nursing agencies, this authorisation is only in respect of the documentation put before it. Any amendments to the tender documentation that do not materially change the operation or effect of the tender arrangements from that indicated in the indicative tender documents provided to the Commission may, if the Applicant considers such changes may mean that, at least partially, the amended tender process is not protected by authorisation, receive the benefit of authorisation through the minor variation process in section 91A of the TPA. In this respect, one option for HPV would be to stockpile such variations until the consultation process with area health services and nursing agencies is completed.

6.139 Any material change to the indicative tender documentation may constitute a material change of circumstances sufficient for the Commission to consider revocation of the whole authorisation.

6.140 In addition, any amendments to the tender documents which in any way changes the effect of any of the conditions of authorisation imposed by the Commission would not be protected by this authorisation. Any such amendment may be considered to be non-compliance with a condition sufficient for the Commission to consider revocation of the whole authorisation.

6.141 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. As noted above, prior to contracts being entered into, there will be a period of further consultation between HPV, area health services and nursing agencies. Additionally, the tender process itself will be run. The Commission considers that these processes should be able to be completed within 12 months. The Commission therefore proposes to grant authorisation for a period of 6 years. Should the consultation and tender process take more than 12 months to complete then the duration of any contracts entered into thereafter will need to be amended accordingly if they are to be protected by this authorisation for their full term.

6.142 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.

6.143 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 or amended, this may constitute a material change of circumstance sufficient for the Commission to reconsider the authorisation granted.

7. Determination

7.1 For the reasons outlined in Chapter 6 of this 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.

7.2 The Commission therefore grants authorisation under section 88 of the TPA to applications A90811 and A90812, as amended on 16 January 2002, 9 April 2002 and 9July 2002. This authorisation is subject to any application to the Australian Competition Tribunal for its review. Authorisation is granted subject to the following conditions.

C1: Clause 3.3.2 of the Tender Conditions and Clause 10.3 of the Services Agreement must be amended to provide that the maximum price payable to the contractor for the supply of a temporary nurse must not exceed a GST exclusive rate of 80% above the basic Award/EBA rate for the replacement grade nurse plus 15% above the allowances provision included in the Award/EBA for the replacement grade nurse.

C2: A new sub clause (8.1.6) must be inserted into the Services Agreement to read "The Contractor's liability to indemnify a Health Service in respect of clause 8.1 is limited to acts or injury caused directly or indirectly as a result of the actions of the Contractor or persons engaged by the Contractor in the provision of the services by or on behalf of the Contractor under this document".

C3: Clause 9.2.6 must be deleted from the Services Agreement.

C4: Clause 13.3 must be amended so as to provide that the cost recovery provisions of this clause are only applicable in the event that there is confirmation that a particular nursing agency has committed to supplying a nurse for a particular shift and then fails to do so. Clause 13.3 must also be amended so as to provide that the maximum amount which health services may recover from a nursing agency is the difference in cost between the agreed contract price for providing a nurse and the actual amount paid by the Health Service in sourcing that nurse from elsewhere.

7.3 Authorisation is granted for a period of six years.

7.4 This determination is made on 4 December 2002. If no application for review of the determination is made to the Australian Competition Tribunal, it will come

into force on 26 December 2002. If an application is made to the tribunal, the determination will come into force:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or

- where the application is withdrawn – on the day on which the application is withdrawn.

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.

Appendix E: Submissions in relation to the draft determination

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

- Peter MacCallum Cancer Institute
- Code Blue Specialist Nurses
- Nursing Agencies Association of Australia
- Austin & Repatriation Medical Centre
- Commonwealth Department of Health and Aged Care
- Russell Gilmore
- Recruitment and Consultancy Services Association

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.

A number of interested parties also made oral submissions to the Commission at the pre-decision conference.