

## **Public Benefits**

### *Introducing consistency and certainty to the nursing agency/hospital relationship*

- 5.8 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.
- 5.9 Bayside Health 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 Bayside Health. Bayside Health stated 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.
- 5.10 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 a 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. The Peter MacCallum Cancer Institute stated that it hoped that the tender arrangements would address this problem.
- 5.11 The Austin and Repatriation Medical Centre (ARMC) stated that the proposed arrangements would formalise the administrative arrangements between health services which would lead to greater clarity, such as with regard to which party bears cost such as superannuation, workcover and professional indemnity. The ARMC stated that at present, these arrangements vary from agency to agency.
- 5.12 In addition to those arguments noted above, a number of public hospitals and area health services contended that the proposed arrangements would generate public benefits by:
- establishing some standardised measures of performance;
  - consolidating the items in the DHS direction into a contract;
  - introducing greater transparency in the agency/hospital relationship;
  - freeing up health services from the negotiating role that will be taken by HPV; and
  - introducing standardised measures of performance.
- 5.13 Additionally, HPV argued that streamlining of administrative processes and procedures among the participating health services and a greater degree of administrative consistency between the various health services would also

benefit agency nurses. 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.

- 5.14 The Nursing Agencies Association of Australia (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.
- 5.15 Code Blue Specialist Nursing Agency (Code Blue) stated that most agencies already work harmoniously with health services and that the government was exaggerating discrepancies between agencies that did not exist.

*Administrative cost savings*

- 5.16 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 under a collective process, rather than having to deal with them individually.
- 5.17 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.
- 5.18 Several area health services also noted that there was significant administrative cost, 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.
- 5.19 The Peter MacCallum Cancer Institute noted the particular problems faced by smaller organisations when utilising agency nurses. The Peter MacCallum Cancer Institute stated that it currently deals with up to 60 agencies to fill its agency nursing needs, and that because of its size it does not have the budget or the staff to deal with the administrative burden this creates. It contended that the tender arrangements would reduce this administrative burden. The Peter MacCallum Cancer Institute further stated that it was hopeful that the tender process would establish the same set of rules and conditions for all agencies so that it would not have to deal with them each individually.
- 5.20 Code Blue stated that the argument that arrangements will result in administrative cost savings to the public health system has not been supported by either: (a) quantification of the alleged administrative cost savings; or (b) substantiation that the public health services have experienced any difficulty in undertaking such negotiation process on their own account.
- 5.21 PRN Nurses also questioned the validity of the administrative cost savings claimed to flow from the tender arrangements, and stated that current administrative waste in hospitals is significant.

- 5.22 RCSA submitted that there is no evidence to suggest that the proposed arrangements will result in administrative cost savings.

*Service standards*

- 5.23 HPV contended that the tender system is an important means by which it can ensure service standards are met, through requiring that the service standards specified in the tender documents be actively demonstrated by agency nurses in order for them to be considered to be on the panel of successful tenderers.
- 5.24 Several health services noted their support for the introduction of service standards for agency nurses through the proposed tender arrangements. The Peter MacCallum Cancer Institute stated that the proposed tender arrangements would ensure that successful agencies would meet the expectations of the health services with regard to quality assurance. The Peter MacCallum Cancer Institute argued that a balance is needed to ensure that permanent staff provide the majority of nursing care in hospitals and that temporary nurses, supplied by private agencies, are subject to quality processes.
- 5.25 The RCSA submitted that there is no evidence to suggest that the quality of service which is currently provided by nursing agencies is any less than that which would be required to be met by successful tenderers under the proposed arrangements.
- 5.26 PRN Nurses stated that the service targets in the proposed tender contracts are unattainable due to the current nursing shortage.
- 5.27 Code Blue argued that there has been no explanation as to why the health services acting individually cannot seek to impose service standards. Code Blue argued that the proposed arrangements will result in the imposition of unfair commercial terms on nursing agencies which were not reflected in any previous services agreements entered into between nursing agencies and health services.

*Other public benefits*

- 5.28 HPV contended that the proposed arrangements would significantly enhance the quality of patient care through:
- the likely direction, by health services, of administrative cost savings into the employment of additional nurses or other personnel, which would, it contends, clearly have a potential to benefit the quality of patient care;
  - the clear focus by HPV on continuous improvement in service standards and patient care in the terms of the Request for Tender and Services Agreements; and
  - the service level and performance target which will be set, and incorporated into the Services Agreements (after negotiation with the successful tenderers) between tenderers and HPV.

- 5.29 The ARMC argued that the proposed arrangements would generate public benefits by:
- providing standard measures of usage and demand which will assist in future workforce planning;
  - promoting workplace harmony and employment equity in the nursing workforce by establishing standard conditions of employment across all agency nurses and between agency nurses and permanent staff;
  - providing a means to control casual nursing staff; and
  - providing some certainty in planning for casual staff costs and requirements.
- 5.30 However, PRN nurses contended that the proposed arrangements were designed to move back towards the centralised booking system which hospitals had tried to move away from, with good reason, over the last five years. PRN Nursing questioned how a centralised booking system would correctly match the right clinical staff with areas of need.
- 5.31 Code Blue argued that, even assuming the public benefit arguments are accepted, they have no connection with the exclusivity component of the proposed arrangements.

### **Anti Competitive Detriment**

#### *Reduction in long term supply of nurses*

- 5.32 Code Blue submitted that the proposed arrangements would reduce agency nurses' remuneration levels and thereby impact on the supply of nurses. Specifically, Code Blue contended that nursing agencies will tender below the capped remuneration level set out in the DHS direction, which will be reflected in reduced wages to agency nurses.
- 5.33 RCSA also noted that while the DHS directive caps agency nursing wages at 80% above the award, the proposed tender arrangements cap the rate at a GST inclusive rate of 80% above the award. Consequently, the proposed tender arrangements would reduce agency nurses' wages below the rate provided for in the DHS direction, and therefore impact on the long-term supply of nurses.
- 5.34 HPV noted that the DHS direction did not address the issue of GST. HPV acknowledged the resultant discrepancy between the maximum rate payable under the DHS direction and the proposed tender arrangements. HPV noted that it would be prepared to amend its tender documentation to provide that the maximum rate payable by hospitals to agencies under the proposed arrangements is GST exclusive, should the Commission require a condition of authorisation to this effect.

- 5.35 The RCSA further argued that the Commission's conclusion that the impact of a change in their remuneration would not impact significantly on the overall supply of nurses (because agency nurses only represent 2% – 3% of the overall market for nursing services), is overly simplistic. The RCSA noted HPV's assertions that there is currently a shortage of qualified nurses in Australia and that in some situations, such as emergency wards, hospitals are sometimes forced to employ up to 50% of their nurses through agencies. The RCSA also submitted that in its view 10% - 15% of the total nursing workforce have undertaken agency work, either full time, or supplementing shifts.
- 5.36 In contrast, PRN Nurses noted that the Commission's draft determination states that HPV is heavily reliant on nursing agencies, but then goes on to state that approximately 3% of nurses are agency staff. PRN Nurses contended that this figure of 3% does not warrant the use of the term 'heavily reliant'.
- 5.37 With respect to the possibility that agency nurses may exit the profession or decrease their number of shifts worked in response to a reduction in their wage rate, HPV contended that any reduction in agency nurses wages as a result of the proposed tender arrangements was, given the DHS direction, likely to be small. However, in the event that the proposed arrangement did cause a further (small) reduction in agency nurses wages, HPV argued that this would not significantly change the longer-term supply of nurses.
- 5.38 HPV submitted that anecdotal evidence from DHS suggests that a return to wages consistent with the Industrial Relations Commission decision in the past has led to greater participation of nurses in hospital nurse banks. It further contended that recent data from DHS suggests that rather than causing nurses to exit the industry, the DHS direction has actually increased the employment of nurses by hospital nurse banks.
- 5.39 Specifically, HPV stated that data collected by DHS between March and July 2002 (the first three months after the DHS direction was introduced) from the thirteen metropolitan health services and the three largest non-metropolitan health services indicated that while utilisation of nurses from agencies has dropped by 46%, the utilisation of nurses from hospital nurse banks has increased by 52%. HPV contended that DHS information also suggests that during this period approximately 1,400 nurses joined public hospital nurse banks. HPV argued that this casts some doubt over claims that a return in agency nurses' wages to award rates would lead to a shortage of nurses in the industry.
- 5.40 The RCSA stated that since the written direction was issued, RCSA agencies had only been able to fill approximately half of the requests for nursing staff that they were previously filling. The RCSA also stated that some of the 1,400 nurses identified by the DHS as returning to nurse banks belong to more than one nurse bank and therefore would have been double counted.
- 5.41 The Peter MacCallum Cancer Institute contended that the reduction in agency nurses wages resulting from the DHS direction had resulted in many nurses returning to permanent employment in public hospitals.

- 5.42 The Peter MacCallum Cancer Institute also noted that it now sources only 2% of its staff from agencies, as opposed to the 38% it was sourcing from agencies prior to the DHS direction. The Peter MacCallum Cancer Institute contended that this had saved hours per day in ringing around and trying to coordinate agency nurses to fill shifts. It also noted that being staffed almost 100% by full time employed nurses had also resulted in significant staffing cost savings.

*Possible reduction in number of nursing agencies*

- 5.43 Code Blue submitted that the tender arrangements would increase concentration in the nursing agency sub market as the reduction in supply of agency nursing staff resulting from lower wages will force agencies to amalgamate to lower overhead costs.
- 5.44 Code Blue also noted that while the DHS direction caps the rate at which public hospitals can remunerate agency nurses, it does not restrict agencies in competing to supply nurses. Code Blue submitted that in the absence of the proposed tender arrangements, agencies would continue to compete to supply agency nurses. However, Code Blue submitted that the combination of a substantial aggregation of bargaining power (with HPV) and the award of an exclusive contract to a limited number of agencies, will substantially damage competition in the market for nursing services, by both removing actual competitors from the market and raising substantially barriers to entry.
- 5.45 The RCSA also noted that the DHS direction, while capping the rate at which public hospitals can pay agency nurses, does not have the direct impact of excluding nursing agencies from the market for supplying of these services. The RCSA argued that the proposed tender process will directly reduce the number of nursing agencies by limiting those agencies able to supply public hospitals to the successful tenderers.
- 5.46 RCSA contended that it may be in long run that the effect of the tender process and the DHS direction will be similar in that the imposition of the cap may result in certain competitors in the industry not competing at that level, therefore reducing competitors in the market to the same number (and perhaps identity) as would result from the tender process, however, there was nothing concrete on which to base that assertion.
- 5.47 In relation to the Commission's conclusion that those agencies who survive the impact of the DHS direction but are unsuccessful in the tender process would still be able to provide services to the remaining 50% of the market, RCSA submitted that the non-metropolitan public health market does not have a high demand for agency nurses and the private market is dominated by a small number of operators and is therefore effectively a closed market.
- 5.48 RCSA also submitted that the activities of establishing and maintaining a nursing agency are both time consuming and costly and consequently there are significant barriers to entering the market.
- 5.49 Code Blue also argued that the proposed tender arrangements would increase barriers to entry to nursing agencies as the granting of exclusive rights to supply

will foreclose 50% of the market for agency nurses to unsuccessful tenderers and potential new entrants for at least 5 years. Code Blue submitted that smaller agencies such as itself could not survive a 50% foreclosure of its market for a period of 5 years.

- 5.50 HPV stated that under the proposed arrangements a broad range of agencies who meet the conditions specified in the tender document will comprise the panel from which area health services will draw agency nurses. HPV stated that no one agency would be able to meet all of the area health services needs, that the criteria for inclusion on the panel would be flexible and that agencies meeting these criteria would be included on the panel.
- 5.51 Several area health services also noted that it was their understanding that a broad range of agencies who meet the minimum standards will comprise the panel from which they will source agency nurses. Area health services contended that they were seeking an inclusive rather than exclusive tender and did not want to restrict the number of successful tenderers.
- 5.52 Code Blue noted statements made by HPV at the pre decision conference that it intends to draw on a broad range of agencies. However, Code Blue noted that there is nothing in the proposal put for authorisation that suggests this will be the case. Code Blue submitted that HPV will, through the tender process, have the freedom to determine for itself the future structure of the Victorian market for the supply of agency nurses.
- 5.53 In response to further queries from the Commission (see paragraph 2.46) HPV confirmed in writing that it was intended that a broad range of agencies will be admitted to the panel from which area health services will draw agency nurses, provided the prospective tenderer satisfies the tender requirements.
- 5.54 HPV stated that it anticipated entering into Services Agreements with each agency on behalf of the hospitals, and would provide a copy of each such agreement to each hospital. HPV noted that hospitals would be free to select temporary nursing staff from any panel member. HPV noted that the only change to the current practices will be that temporary nursing staff must be exclusively selected from one of the panel members.
- 5.55 HPV further argued that the number of agencies able to be appointed to the panel would have a very small impact on competition in the relevant market in any case as those agencies unsuccessful in the tender process would still have access to approximately 50% of the market.

#### *Specific clauses of the Services Agreement*

- 5.56 A number of interested parties raised concerns with specific clauses in the proposed Services Agreement. Concerns raised by interested parties in respect to specific clauses, and HPV's response to these concerns, are summarised below. However, more generally, 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 Agreement 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.

- 5.57 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.
- 5.58 HPV contended that these issues can not be considered by the service reference group until such time as authorisation is granted as such discussion in itself may raise concerns under the TPA.
- 5.59 HPV noted that certain provisions of the Services Agreement provided as part of its application for authorisation may change following discussion and consultation by the service reference group. HPV noted that it is its intention that a flexible approach be taken in application of the Services Agreements.
- 5.60 Therefore, HPV noted that in respect to concerns raised about the specific clauses of the Services Agreement, as detailed below, in some cases, it was only able to provide an indication of the intention behind the clauses as they have been drafted, as precise details of how the clauses may be finally drafted and applied will only be able to be determined following the granting of authorisation.
- 5.61 Clause 3.6 of the Services Agreement reads:
- 3.6 The contractor shall ensure the services conform with the Performance Indicators set out in schedule 4. Failure to comply with those indicators shall entitle the Health Service to:
- 3.6.1 require more frequent reporting and monitoring of the Contractors performance....
- 3.6.2 impose the financial reductions specified in Schedule 4....
- 5.62 A number of interested parties expressed concerns that HPV has not made available a copy of Schedule 4.
- 5.63 HPV noted that details of the performance indicators, and consequences for non compliance will be determined through wide consultation via the service reference group. As noted above, HPV did not consider that the service reference group would be in a position to discuss or determine these details unless or until authorisation was granted.
- 5.64 HPV did note that these performance indicators may include measures such as financial penalties for non-compliance with Services Agreements or an agreed resolution process between a particular hospital and agency in question.

Specific details of the circumstances in which financial penalties may be applied are discussed in further detail below.

- 5.65 HPV also noted that in setting key performance indicators it appreciated the need that such indicators not be unduly onerous, or have the effect of restricting the supply of agency nursing services to health services.
- 5.66 Clause 6.1 of the Services Agreement reads:
- 6.1 The Contractor cannot provide and a Health Service will not accept Nursing Services from a person who is a current member of the Health Service's permanent staff.
- 5.67 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.
- 5.68 HPV noted that Clause 6.1 of the Services Agreement 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. HPV contended that this clause does not impact on the public benefits or detriments of the proposed arrangements as applying the 'future with or without test' if authorisation were not granted, or if this clause was deleted, agencies and health services would still be required to abide by this clause by virtue of its inclusion in the DHS direction.
- 5.69 HPV also noted that in any event, the rationale behind this provision was to reduce the chances of creating an environment of industrial unrest and disharmony, as would be likely to result in the event that nurses in the employ of a hospital also work shifts at the same hospital through an agency with corresponding different conditions of work and rates of pay.
- 5.70 Clause 8.1 of the Services Agreement relevantly reads:
- 8.1 The Contractor shall be liable for and shall indemnify each Health Service ('the indemnified Health Service') its officers, servants, employees and agents against any liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of:....
- 8.1.3 Any damage to property, real or personal, including any infringement of third parties patents, copyrights and registered designs;
- 8.1.4 Any injury to persons, including injury resulting in death and economic loss; and...
- 5.71 Several interested parties raised concerns that on 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.
- 5.72 HPV confirmed to the Commission that the intent of clauses 8.1.3 and 8.1.4 of the Services agreements 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.

- 5.73 HPV noted that it was willing to amend 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 should the Commission require a condition of authorisation to this effect.
- 5.74 Clause 9.2 of the Services Agreement specifies the level and type of liability insurance which must be maintained by nursing agencies. Several nursing agencies expressed concerns that insurance of the kind required under this clause is not currently available to them in the market.
- 5.75 HPV noted that two forms of insurance are relevant in this regard, namely professional indemnity insurance and public liability insurance.
- 5.76 HPV stated that it is aware of a number of suppliers of these types of insurance, however it believed that this is a private matter between nursing agencies and their insurance brokers. HPV noted that it does not, and never has, intended that the Services Agreement would regulate this relationship between agencies and their insurance brokers.
- 5.77 HPV noted that professional indemnity insurance is available to nurses via professional and industrial organisations. Nurses are automatically covered for professional indemnity insurance in cases where the nurse is a member of the relevant union, namely, the Australian Nurses Federation (ANF).
- 5.78 On the other hand, HPV noted that an agency would be required to insure a nurse working for it in respect of public liability insurance and, in cases where the nurse is not part of the ANF, for professional indemnity insurance.
- 5.79 HPV stated that it understood that the ANF had engaged an insurance broker to determine the existence of insurers to cover such insurance as described above and has found that four such insurance companies exist.
- 5.80 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.
- 5.81 HPV stated that it intends to request that VMIA make this specific information available for inclusion with the tender documentation.
- 5.82 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.

- 5.83 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 submitted that it is prepared to delete clause 9.2.6 to address these concerns should the Commission require a condition of authorisation to this effect.
- 5.84 Clause 10.2 of the Services Agreement specifies the fees 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.
- 5.85 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.
- 5.86 HPV stated that clause 10.2 has been drafted entirely on the basis of condition 2 of the DHS direction. HPV argued that this clause is necessary to maintain consistency between the DHS direction and the proposed tender arrangements. HPV contended that this clause does not impact on the public benefits or detriments of the proposed arrangements as applying the 'future with or without test' if authorisation were not granted, or if this clause was deleted, agencies and health services would still be required to abide by this clause by virtue of its inclusion in the DHS direction.
- 5.87 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.
- 5.88 A number of agencies stated that they consider the requirements of this clause particularly onerous, to the point of unconscionability within the meaning of section 51AC of the TPA.
- 5.89 Section 51AC of the TPA prohibits unconscionable conduct in business transactions. While unconscionable conduct is not defined within the TPA, section 51AC does include a list of factors which a Court may have regard to including:
- the relative bargaining strength of the parties to the arrangements; and

- whether, as a result of the conduct engaged in, there was requirement to comply with conditions not reasonably necessary to protect the other parties' business interests.
- 5.90 The RCSA contends that this requirement is particularly onerous 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.
- 5.91 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.
- 5.92 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.
- 5.93 HPV noted that clause 13.3, as currently drafted, does not operate in this manner. HPV submitted that it is prepared to amend clause 13.3 to reflect this intention should the Commission require a condition of authorisation to this affect. However, HPV further noted that it is intended that the method of operation of provisions such as these would be the subject of discussion by the service reference group if authorisation is granted.
- 5.94 HPV contended that clause 13.3, as it is intended to be applied, is not unduly onerous and is not at risk of being considered unconscionable within the terms of section 51AC of the TPA. HPV considered it a standard term which would be likely to appear in any commercial agreement of this nature.
- 5.95 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.

## **6. Commission Evaluation**

### **Future with and without test**

- 6.1 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.<sup>13</sup> 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.
- 6.2 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 nursing agencies for the supply of temporary nursing staff.

### **Section 42 written direction**

- 6.3 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.
- 6.4 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.
- 6.5 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.
- 6.6 Many submissions to the Commission from interested parties in relation to the proposed tender arrangements were highly critical of the written direction issued by the DHS.
- 6.7 However, HPV has not sought authorisation for the DHS 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 DHS direction outweighs any associated public detriment.

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<sup>13</sup> See, for example, *Re Australasian Performing Rights Association* (1999) ATPR 41-701.

- 6.8 Having noted this, the Commission has evaluated the proposed tender arrangements in the context where the DHS direction is, and as indicated by the DHS, will continue to remain, in place.
- 6.9 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 DHS direction (as summarised in paragraphs 4.2 and 4.3) now flow as a consequence of the DHS direction irrespective of whether authorisation is granted for the proposed tender arrangements.
- 6.10 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 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 applications for authorisation.
- 6.11 A number of interested parties have questioned the Commission evaluating the proposed tender arrangements in the context where the DHS direction is, and will continue to remain, in place. Several interested parties contended that the proposed tender arrangements should be considered as a stand-alone set of arrangements irrespective of any other arrangements that are in place. Others questioned whether the DHS direction could or would be able to remain in place in the longer term in any event.
- 6.12 As noted above, in applying the future with or without test the Commission is required to compare 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.
- 6.13 For example, several interested parties have contended that the proposed tender arrangements will result in a reduction in remuneration paid to agency nurses which will reduce the long term supply of nurses. In this respect, the DHS direction has already capped the rate at which agencies can be paid for supplying agency nurses at 80% above the relevant award rate. This is, and will remain the case, irrespective of whether the Commission grants authorisation to the proposed tender arrangements. Therefore, relevant to the Commission's consideration of the proposed arrangements is the public benefit and public detriment that any reduction in agency nurses wages below 80% above the award rate, that the proposed tender arrangements would generate. That is, any public benefit or public detriment over and above that which is generated by the DHS direction irrespective of whether authorisation is granted to the proposed tender arrangements.
- 6.14 In this respect the Commission notes that the DHS has confirmed its intention that, should authorisation be granted, its direction will remain in place for the duration of any contracts entered under the proposed tender arrangements. If the direction is subsequently revoked, this may constitute a material change of circumstance sufficient for the Commission to reconsider the authorisation granted.

- 6.15 However, while the direction is, and as stated by the DHS, will remain, in place the Commission must consider the proposed tender arrangements in that context, having regard only to those public benefits and public detriments which may be generated by the proposed arrangements in this context.

### **The relevant market**

- 6.16 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.
- 6.17 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.
- 6.18 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**

- 6.19 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 of agencies able to supply the sub-market for casual nurses.

### **Reduction in long term supply of nurses**

- 6.20 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.
- 6.21 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.

- 6.22 In its draft determination the Commission considered that given that the DHS direction has capped remuneration for agency nurses in public hospitals at the relevant award rate plus 80% it would be unlikely that the tender arrangements would significantly reduce casual nursing remuneration.

*Issues arising out of the draft determination*

- 6.23 Several nursing agencies submitted that they would not be able to tender below the rate provided for in the written direction. Code Blue submitted that some agencies would tender below the rate provided for in the DHS direction. No agency submitted that it would be able to tender below the rate in the DHS direction.
- 6.24 The RCSA also noted that while the DHS direction caps agency nursing wages at 80% above the award, the proposed tender arrangements cap the rate at a GST inclusive rate of 80% above the award. Consequently, the proposed tender arrangements would reduce agency nurses' wages below the rate provided for in the DHS direction.
- 6.25 HPV noted the discrepancy between the maximum rate payable under the DHS direction and the proposed tender arrangements and indicated that it would be prepared to amend its tender documentation to provide consistency between the two rates should the Commission require a condition of authorisation to that effect.
- 6.26 HPV argued that any reduction in agency nurses wages as a result of the tender arrangements was, as a result of the written direction, likely to be small and would not significantly change the longer-term supply of nurses.
- 6.27 HPV, nursing agencies and health services all noted that there had been a dramatic decrease in the number of agency nurses employed by hospitals since the DHS direction has been issued.

*Commission evaluation*

- 6.28 As noted above, the DHS 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 agency nursing remuneration, with potential consequences for supply of nurses in the longer term.
- 6.29 In this respect, the Commission notes that:
- presumably, in issuing the 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;

- while one nursing agency has submitted that some agencies will tender below the DHS direction rate, no agency has submitted that it will tender below the DHS direction rate and 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 DHS direction price cap.
- 6.30 These factors seem to suggest that it would be unlikely that the tender would reduce casual nursing remuneration significantly below the DHS direction cap.
- 6.31 In any case, agency nurses comprise a very small section of the overall market for nursing services. Prior to the issuing of the DHS direction agency nurses constituted approximately 3% of all nurses employed by public hospitals and approximately 2% of nurses employed by private hospitals. As noted by HPV, health services and nursing agencies, the DHS direction has resulted in a further dramatic reduction in the percentage of all nurses employed who are agency nurses (by limiting the employment of agency nurses to unexpected absences).
- 6.32 The Commission notes the RCSA's assertion that a change in remuneration to agency nurses would impact on the overall supply of nurses. However, the Commission considers that given that any change in the remuneration of agency nurses as a result of the tender arrangements is likely to be small, and that this change, if any, will only affect a very small (and reducing further as a result of the DHS direction) sector of the market, it would be unlikely to result in a significant change in the longer term supply of nurses.
- 6.33 With respect to the RCSA's argument that the maximum cap provided in the proposed tender documents is lower than that provided in the DHS direction, which would lead to a further reduction in agency nurses wages, the Commission notes that this is a (possibly unintended) discrepancy which HPV has indicated that it is prepared to amend its tender documentation to rectify. The Commission has imposed a condition of authorisation to this affect.
- 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.**

#### **Possible reduction in number of nursing agencies**

- 6.34 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.

- 6.35 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.<sup>14</sup>
- 6.36 However, in its draft determination the Commission considered this an unlikely outcome given that the DHS direction has substantially reduced the demand for agency nurses by public hospitals which would be likely to, over time, reduce the number of agencies in the market, and that a significant portion of the market remains open to remaining agencies after the effect of the DHS direction.
- 6.37 The Commission also considered that to the extent that the proposed tender arrangements do further reduce the number of nursing agencies, hospitals could rely more on nursing banks to supply their casual nursing requirements.

*Issues arising out of the draft determination*

- 6.38 Some nursing agencies contended that the Commission's conclusion that unsuccessful tenderers would still have access to 50% of the market was overly simplistic as non-metropolitan public hospitals rarely employ agency nurses and the private health system is effectively a closed shop.
- 6.39 A number of nursing agencies noted that while the DHS direction caps the rate at which public hospitals can remunerate agency nurses, it does not restrict agencies competing to supply nurses. They argued that the proposed tender arrangements will directly reduce the number of nursing agencies by limiting those agencies able to supply public hospitals to successful tenders. It was also submitted that the exclusivity of the proposed arrangements would raise barriers to entry to the market.
- 6.40 HPV and area health services stated that a broad range of agencies who meet the conditions specified in the tender document will comprise the panel from which area health services will draw agency nurses.
- 6.41 The Commission wrote to HPV seeking clarification of this point. HPV responded that it anticipated entering into Services Agreements with each successful agency on behalf of hospitals. HPV stated that hospitals would be free to select temporary nursing staff from any panel member with the only change from current practices being that the temporary nursing staff will be exclusively selected from one of the panel members.

*Commission evaluation*

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<sup>14</sup> 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.

- 6.42 The DHS 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. Submissions made to the Commission by HPV, area health services and nursing agencies all indicate that the written direction has 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.
- 6.43 Some nursing agencies have argued that, by granting exclusive rights to a limited number of agencies to supply the metropolitan public health system, the proposed tender arrangements will further reduce the number of nursing agencies.
- 6.44 The Commission notes that under the proposed tender arrangements, exclusive rights to supply agency nurses to public hospitals will be granted to a number of agencies. However, based on the information provided to it, the Commission understands that a broad range of agencies who meet the conditions specified in the tender document will comprise the panel from which hospitals will draw agency nurses.
- 6.45 Specifically, HPV has stated that the criteria for inclusion on the panel of agencies from which hospitals will source agency nurses will be flexible and that agencies meeting these criteria will be included on the panel. It is therefore unlikely that any of the more efficient nursing agencies (those that are able to meet the criteria for inclusion on the panel) would be forced out of the industry as a result of the proposed tender arrangements.
- 6.46 It is therefore unlikely that the proposed tender arrangements will result in a further significant reduction in the number of nursing agencies beyond that caused by the reduction in overall demand for agency nurses as a consequence of the DHS direction.
- 6.47 The Commission notes the argument presented by Code Blue that while HPV has stated that it intends to draw on a broad range of agencies, there is nothing in tender documents put to the Commission for authorisation which confirms this.
- 6.48 HPV has clearly stated at the pre-decision conference, and in a further written submission to the Commission, its intention that the panel of agencies from which area health services will draw agency nurses will be made up of a broad range of agencies which meet the tender requirements. The Commission's assessment of the public benefits and anti competitive detriments of the proposed arrangements is predicated on this assumption. Any conduct engaged in by the applicant, or any other party to the arrangements, which is not in accordance with these processes, as submitted to the Commission by HPV, is not protected by this authorisation.

- 6.49 The Commission also notes that should all the health services listed as potential parties to the proposed tender elect to participate in the arrangements this would constitute approximately 70% of the public sector demand for nursing services. In turn, total public sector demand for nursing services constitutes approximately 67%<sup>15</sup> of total demand for nursing services. The proposed parties to the arrangements therefore constitute approximately 50% of the total demand for nursing services in Victoria.
- 6.50 The Commission notes the argument put forward by one nursing agency that given non-metropolitan public hospitals rarely employ agency nurses and the private health system is effectively a closed shop, these sections of the market would not be open to agencies unsuccessful in the tender process.
- 6.51 While it appears that that the metropolitan public health system is the core market to which nursing agencies supply, a (possibly significant) proportion of the overall market for agency nursing services would seem likely to remain open to those nursing agencies unable to meet the tender requirements.
- 6.52 Additionally, as noted above, the DHS direction has significantly reduced (some area health services contend almost totally eliminated) demand for temporary nursing staff supplied by nursing agencies to metropolitan public hospitals. Specifically, the DHS direction provides that health services may only engage agency nurses to cover unexpected absences by permanent staff, whereas previously they had been employed in a much wider range of circumstances, including in some instances, to cover ongoing fulltime positions which hospitals were unable to fill with permanent staff.
- 6.53 Given the significantly reduced reliance on agency nursing staff by metropolitan public hospitals as a consequence of the DHS direction, any small reduction in the number of nursing agencies as a result of the proposed tender arrangements is, particularly given that it is only likely to be agencies who are unable to meet the necessary service standards to be included on the panel of agencies which will be excluded, unlikely to generate a significant public detriment.
- 6.54 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.
- 6.55 In addition, hospitals could rely more on nursing banks to supply their casual nursing requirements. The Commission understands that since the DHS direction was issued increasing numbers of nurses who wish to offer their services on a casual or temporary basis are choosing to do so through hospital run nursing banks rather than private nursing agencies.

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<sup>15</sup> Victorian Government Department of Human Services, *Nurse Labourforce Projections Victoria 1998 – 2009*, 1999.