

Our ref: 0019250
Your ref: C2002/527

19 November 2002

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Dear Tim

HPV authorisation application - responses to ACCC's questions

I am writing in relation to the above matter, in which we act for Health Purchasing Victoria ("HPV").

We have prepared a response to the issues raised by the Australian Competition and Consumer Commission ("ACCC") in its letter of 28 October 2002, which are contained in Attachment 1.

We are of the view, however, that these issues identified by the ACCC would not be likely to impact upon the balance of the public benefits and anti-competitive detriment associated with HPV's authorisation application. The majority of the ACCC's questions appear to relate to very specific commercial aspects of HPV's tender proposal, and, we consider, do not impact upon the likely public benefit or anti-competitive detriment which may arise from the tender proposal as a whole.

We consider the tender proposal in its entirety would be unlikely have an anti-competitive effect, predominantly because, as identified by the ACCC in its Draft Determination, approximately 50% of the market as defined by the ACCC would continue to be available to those nursing agencies which may not be successful at being selected to be on the panel. Clearly therefore, a large proportion of the market would be unaffected by HPV's tender proposal.

We would also reiterate that in any case, HPV's tender proposal is likely to lead to a range of public benefits, including reduced administrative costs; improvement in the quality of patient care; the establishment of performance targets to enable regular and accurate assessment of the quality of agency nursing services and patient care; an improvement in the terms of employment of agency nurses through increased consistency and transparency; and a streamlining of administrative policies and procedures. In its Draft Determination, the ACCC found that public benefits would outweigh any possible anti-competitive detriment, and HPV considers that this is an accurate reflection of the current situation.

Please notify us if this communication has been sent to you by mistake. If it has been, any client legal privilege is not waived or lost and you are not entitled to use it in any way.

Please feel free to contact Fleur Gibbons, Anita George or myself if you wish to discuss this matter.

Yours sincerely

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HPV authorisation application - responses to ACCC's questions

1 Panel of nursing agencies

- 1.1 The ACCC inquired whether it is intended that a broad range of nursing agencies that meet the criteria for inclusion on the panel will be selected through the tender process. If that is the case, the ACCC asked how the agency selected to provide agency nursing staff to individual Health Services or hospitals in each particular instance would be determined.
- 1.2 HPV is somewhat confused by the ACCC's apparent concern about the possibility of having an increased number of agencies appointed through the tender process than the ACCC had originally assumed would be the case. That is to say, the ability to appoint an increased number of agencies would presumably be pro-competitive and provide an increased number of agencies with the opportunity to provide temporary nursing services to the participating hospitals. If the ACCC started its assessment of this application on the assumption that only a limited number of nursing agencies would be appointed by HPV through the tender process, whereas in actual fact a greater number of agencies would be able to be appointed, HPV is of the understanding that this should lessen any potential concern which the ACCC may have about the arrangements, not increase it.
- 1.3 In any case, HPV wishes to categorically state that it is intended that a broad range of agencies will be admitted to the panel provided the prospective tenderer satisfies the tender requirements.
- 1.4 HPV anticipates entering into Service Agreements with each agency on behalf of the hospitals, and will provide a copy of each such agreement to each hospital. Hospitals will be free to select temporary nursing staff from any panel member. The only change to the current practices will be that temporary nursing staff must be exclusively selected from one of the panel members.
- 1.5 In any case, HPV understands that the number of agencies able to be appointed to the panel would have a very small impact on competition in the relevant market, as acknowledged by the ACCC in its Draft Determination.
- 1.6 In this Draft Determination, the ACCC considered that the relevant market in which to consider this matter in is likely to be the market for the supply of nursing services to public and private health care providers within Victoria. Further, the ACCC considered that the proportion of this market potentially affected by HPV's proposed tender would be likely to be very small. This is because, as stated by the ACCC on page 19 of its Draft Determination, the health services which potentially plan to participate in the tender process constitutes approximately 70% of the public sector demand for nursing services. In turn, total public sector demand for nursing services constitutes approximately 67% of total demand for nursing services.

- 1.7 Therefore, the proposed parties to the arrangements constitute approximately 50% of the total demand for nursing services in Victoria, leaving 50% of the market available for those nursing agencies which may not be successful in being appointed either onto the panel, or selected from the panel, to provide services to.
- 1.8 Accordingly, HPV is of the view that this issue would not have the effect of impacting upon the balance of public benefit and anti-competitive detriment likely to arise from its authorisation application.

2 Maximum rate payable under the Services Agreement

- 2.1 The ACCC inquired as to whether the maximum rate payable under the Direction of 1 March 2002 by the Secretary of the Department of Human Services pursuant to section 42(1)(c) of the *Health Services Act 1988* ("the DHS Direction") is GST inclusive, and if not, whether HPV intends to address this discrepancy by way of a further amendment to its applications.
- 2.2 HPV notes that the DHS Direction did not address the issue of GST. Subsequent discussions with DHS have revealed that the maximum rate payable under the DHS Direction is intended to be GST-exclusive. HPV acknowledges the resultant discrepancy, and is prepared to determine that the maximum rate payable by the hospitals to the agencies is GST exclusive.
- 2.3 HPV would be prepared to amend its tender documentation accordingly should the ACCC require this by condition of authorisation.

3 Specific clauses of the Services Agreement - Performance Indicators

- 3.1 The ACCC has asked a range of specific questions in relation to various clauses in the Services Agreement which HPV provided to the ACCC some time ago. HPV wishes to highlight to the ACCC that the Services Agreement was provided to the ACCC for indicative purposes only. It was always the intention of HPV that the details of the terms of the Services Agreements would be determined following consultation and discussion by the Service Reference Group. However these issues cannot be confirmed until such time as the ACCC makes a decision as to whether it intends to issue a Final Determination authorising the proposed conduct. Until this time, HPV does not consider that the Service Reference Group would be in a position to discuss in any detail or determine these issues without there being a perception of possible breach of the provisions of the TPA in respect of which HPV is currently seeking authorisation. HPV understands that certain provisions in the draft Services Agreement provided to the ACCC may have to change following discussion and consultation by the Service Reference Group. It has always been HPV's intention to be flexible in its approach and in its application of the Services Agreements.

- 3.2 Therefore in respect of the ACCC's questions about specific provisions in the Services Agreements, HPV can provide an indication of the intention behind the provisions as they have been drafted, however the precise details of how the clauses may be finally drafted and applied will only be able to be determined following the issue of a Final Determination granting authorisation to HPV's application.
- 3.3 The ACCC asked whether HPV could provide details of the performance indicators that will be included in Schedule 4, or, in the absence of detailed indicators being available, whether HPV could provide indicative performance indicators. Additionally, the ACCC inquired as to whether HPV could provide details of financial penalties which will be provided for in the event that performance indicators are not met.
- 3.4 It is intended that details of the performance indicators, and consequences of non-compliance with such performance indicators will be determined through wide consultation via a Service Reference Group. This Service Reference Group will be constituted by representatives of the health services which propose to participate in HPV's tender system, which is the subject of the current authorisation application.
- 3.5 The performance indicators and framework for their operation which will be settled upon by the Service Reference Group have not yet been determined, and may or may not include measures such as financial penalties for non-compliance with Service Agreements or an agreed resolution process between the particular hospital and agency in question.
- 3.6 However as discussed above, these issues cannot be confirmed until such time as the ACCC makes a decision as to whether it intends to issue a Final Determination authorising the proposed conduct. Until this time, HPV does not consider that the Service Reference Group would be in a position to discuss in any detail or determine these issues without there being a perception of possible breach of the provisions of the TPA in respect of which HPV is currently seeking authorisation.
- 3.7 In setting key performance indicators, HPV appreciates the need that such indicators not be unduly onerous, or have the effect of restricting the supply of agency nursing services to health services.

4 Specific clauses of Services Agreement: Use of Health Services Staff

- 4.1 The ACCC inquired as to why it was necessary to include clause 6.1 of the Services Agreement, which states that:

"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".
- 4.2 HPV wishes to bring to the attention of the ACCC that the above requirement is the third condition stipulated in the DHS Direction. As

you would be aware, the ACCC extended an invitation to HPV in May 2002 to amend its original application to match the conditions outlined in this DHS Direction. Accordingly, clause 6.1 is consistent with this request.

- 4.3 As the ACCC is aware, the DHS Direction is a very separate issue and not in any way related to HPV's authorisation application. The DHS Direction was issued pursuant to section 42(1)(c) of the *Health Services Act 1988*, which allows the Department of Human Services to give directions to a public or denominational hospital in relation to the number and type of persons which the hospital should employ or from whom it should obtain services and their conditions of employment or service. Accordingly, the stipulations provided for by the Department of Human Services in its Direction constitute the "without authorisation" situation against which the ACCC is to assess HPV's application for authorisation. Thus, the effects on public benefits and anti-competitive detriments of the condition in clause 6.1 should be disregarded in the ACCC's assessment.
- 4.4 However by way of background, HPV wishes to confirm to the ACCC that the rationale behind this provision is 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 correspondingly different conditions of work and different rates of pay. It has been considered that the likely effect of this situation would be a greater reduction in the standard of the quality of care supplied than would be the case if nurses in the permanent employ of a hospital were not able to provide agency nursing services at the same health facility.

5 Specific clauses of Services Agreement - Indemnity of Health Services

- 5.1 The ACCC inquired as to the intention of clauses 8.1.3 and 8.1.4 of the Services Agreement, which provide that nurse agencies are liable to indemnify each Health Service for damage to persons or property, regardless of who owns the property, who is injured, and who caused the injury or damage.
- 5.2 HPV wishes to confirm to the ACCC 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.
- 5.3 Accordingly, HPV is 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 ACCC require this by condition of authorisation.

6 Specific clauses of Services Agreement - Insurance obligations

- 6.1 The ACCC identified that clause 9.2.4 of the Services Agreement requires Contractors to maintain specific forms of insurance, and made a number of inquiries in this regard. Firstly, the ACCC asked whether HPV was aware of whether insurance of the type referred to in the Services Agreement is currently available in the market and if so, the identity of the insurers providing such insurance.
- 6.2 Two forms of insurance are relevant in this regard, namely professional indemnity insurance and public liability insurance.
- 6.3 HPV is aware of a number of suppliers of these types of insurance, however it believes that this is a private matter between nursing agencies and their insurance brokers. HPV does not, and never has, intended that the Services Agreements would regulate this relationship between agencies and their insurance brokers.
- 6.4 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").
- 6.5 On the other hand, 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.
- 6.6 HPV understands that the ANF has engaged an insurance broker to determine the existence of insurers to cover such insurance as described in paragraph 6.5 above, and has found that four such insurance companies exist.
- 6.7 HPV acknowledges that professional indemnity insurance is not available for Independent Midwife Practitioners. However this is outside of the scope of HPV's tender proposal, and as such, is not relevant to the current application. HPV has been advised that the Victorian Managed Insurance Authority ("VMIA") has clarified this issue by confirming to a least one agency and to all hospitals that this insurance provided by the VMIA is not extended to proprietors of nursing agencies.

7 Specific clauses of Services Agreement - Victorian Managed Insurance Authority

- 7.1 The ACCC inquired as to whether the details of the indemnity, coverage and benefits provided by the VMIA, on behalf of the Health Services, is publicly available at this time, and whether it is intended that it will be made publicly available prior to the calling of the tenders.
- 7.2 HPV intends to request that VMIA make this specific information available for inclusion with the tender documentation.

8 Specific clauses of Services Agreement - Indemnity arising from use of diagnostic equipment or procedures involving the emission of ionising radiations

- 8.1 Clause 9.2.6 (in common with clauses 9.2.3 to 9.2.5 and 9.2.7) is inserted in the Services Agreement because the health services' insurance contract with VMIA requires that a clause of this nature is included in every service agreement entered into by a health service: *VMIA Insurance Manual & Register for DHS Public Hospitals 2001-2002*, Section F, clause 3(c)(iii). However, HPV advises that it is prepared to delete clause 9.2.6 to address the concerns of the ACCC if this is required by condition of authorisation.

9 Specific clause of the Services Agreement - Clauses 10.1 - 10.3 Fees payable

- 9.1 The ACCC has inquired as to the rationale behind the above clauses, specifically in regard to why HPV considers it necessary to regulate the labour cost to nursing agencies of providing temporary agency nursing staff to health facilities.
- 9.2 HPV does not intend that the Services Agreement will regulate the relationship between the nurse and the nursing agency, and agrees with the ACCC in that any arrangement between the nursing agency and its nurses regarding the remuneration of nurses would be solely a matter between the nurse and the agency.
- 9.3 HPV considers that with the exception of clause 10.1.1, none of the clauses referred to by the ACCC would appear to regulate the amount payable directly to a nurse, as opposed to the amount payable to the nursing agency.
- 9.4 The terms of clause 10.1.1 have been drafted entirely on the basis of Direction 2 of the DHS Direction, and at the invitation of the ACCC in May 2002 to amend the terms of the tender documentation to reflect the DHS Direction.
- 9.5 In this regard, HPV again wishes to reiterate that the terms of the DHS Direction are in no way a part of HPV's authorisation application and are part of the "without authorisation" situation against which the ACCC assesses HPV's application. Therefore we do not consider that a discussion as to the merits of clauses drafted to reflect terms of the DHS Direction are relevant to the ACCC's assessment of HPV's authorisation application.

10 Specific clauses of the Services Agreement - Clause 13.3 recovery of costs

- 10.1 The ACCC has inquired as to how clause 13.3 of the Services Agreement will apply in practice.

- 10.2 Due to the uncertainty as to the number of agencies that will actually form the panel, HPV has not conclusively determined issues such as these. It has always been HPV's intention to ascertain these issues when crucial practical issues such as the number of agencies on the panel have been determined.
- 10.3 However HPV is able to provide a brief indication of the way in which it is proposed at this time that this clause will operate. It is intended that an agency will only be liable to pay to a health service the difference in the 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.
- 10.4 HPV acknowledges that clause 13.3, as currently drafted, does not operate in the manner described above. Accordingly, HPV advises that it is prepared to amend clause 13.3 of the Services Agreement provided the ACCC requires this by condition of authorisation. However, HPV observes 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, after the ACCC has made a decision as to whether to issue a Final Determination authorising HPV's application.

11 Explanation as to the need for Clause 13.3

- 11.1 HPV does not consider that clause 13.3 as it is intended to be applied is unduly onerous, and does not consider that it risks being considered to be unconscionable within the terms of section 51AC of the *Trade Practices Act 1974*. HPV considers that this is a standard term which would be likely to appear in any commercial agreement of this nature.
- 11.2 HPV considers it to be a standard clause which would appear in many commercial agreements of this nature. This 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 had already confirmed it would be able to provide a nurse for.
- 11.3 HPV does not consider that this clause places onerous obligations upon agencies who enter into Services Agreements with HPV. If the ACCC has specific concerns in relation to this clause, HPV would be happy to discuss this with ACCC, with a view to addressing these issues.

We trust that the above information assists the ACCC in its assessment of HPV's authorisation application. We would be happy to provide any further information which the ACCC may require.