

Kott Gunning
LAWYERS



11 April 2008

Australian Competition & Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Attention: Danielle Staltari
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Dear Sirs

**SUMMARY OF SUBMISSIONS RE: APPLICATION FOR INTERIM
AUTHORISATION: JOB FUTURES LTD:**

We refer to Job Futures Ltd's ("Job Futures") application for authorisation and interim authorisation pursuant to the *Trade Practices Act 1974 (Cth)* of 25 March 2008.

We act for PEP Community Services Inc. ("PEP") and Community First Inc. ("CFI"). Both PEP and CFI are interested parties in relation to Job Futures' applications. They are both 'members' of Job Futures and each hold subcontracts with Job Futures, in addition to their own head contracts, to deliver Job Network Services to the public on behalf of the Department of Education, Employment and Workplace Relations ("DEEWR").

Summary of Submissions

Ongoing Litigation

Our clients are currently involved in litigation in the Supreme Court of Western Australia. Supreme Court civil action numbers: CIV 1572 of 2007; and CIV 1573 of 2007, refer. Within these proceedings our clients allege that restraints of trade in their respective subcontracts with Job Futures are unlawful both at Common Law and pursuant to the *Trade Practices Act 1974 (Cth)*.

Job Futures has plead the fact of the applications for authorisations in the particulars to their amended defence and counterclaim in respect of each of these proceedings. In our view, the grant of an interim application could, subject to its wording, potentially undermine the present Court proceedings and/or a possible finding by the Court that favours our clients.

Detriment to Other Persons

An interim authorisation would appear to implicitly authorise Job Futures' existing Constitution, Code of Conduct May 2004 ("the Code"), and Members' Rights and Responsibilities National Office Charter of Service to Members September 2005 ("the



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Charter”), from which membership obligations arise. As a consequence, it will have a degree of backdated effect.

An existing member who thereafter seeks to tender in competition to Job Futures in the anticipated tender round would likely be in breach of the member obligations, have limited ability to legally challenge such obligations, and, accordingly, risk having its membership terminated. The termination of membership would consequently entitle Job Futures to terminate presently existing subcontract arrangements with that member under the 2006 Subcontract Agreement, leading to financial loss and limiting the subcontractor’s prospects of future tender success.

Members may also suffer detriment as a result of the pending Special General Meeting. Members who may doubt the fairness of the proposed amendments could be swayed to accept them when presented beforehand with an interim authorisation that supports Job Futures’ proposals.

The draft subcontract for the 2009-2012 period has not yet been provided to members or potential members. They would be disadvantaged at the subsequent subcontract entry stage by an authorisation or interim authorisation that permits preliminary restraints.

Urgency

The application for authorisation will be resolved by on or about 25 September 2008. As such, the interim authorisation is not urgently required as there is sufficient time for the main application for authorisation to be determined before invitations to tender are issued in or about October 2008 and, therefore, before the need for any authorisation, in fact, arises.

Job Futures have also been operating pursuant to their model without authorisation since 2002 with success. This is unlikely to change with or without an authorisation.

The applications also relate to proposed amendments to the Constitution, Code and Charter. These proposed amendments may not be passed by the membership.

Special Circumstances

Job Futures have already secured commitments from a majority of prospective tenderers to tender alongside Job Futures in the anticipated tender round in October 2008. Their future viability as an organisation and their anticipated market share at the conclusion of the next tender round is therefore not at any significant risk.

Job Futures is one of the largest providers of Job Network Services in the country. Its market power and position has developed consistently over a long period of time. There is nothing to support the contention that this may change in the absence of an authorisation.

Benefit to the Public

Job Futures will continue to operate successfully irrespective of an authorisation, thereby maintaining any public benefit provided by the model.

Conversely, the restraints contained within the 2006 Subcontract Agreement, the Constitution, the Code and the Charter are anti-competitive and likely to be detrimental to the public interest over the longer term.

The structure of the Job Futures model also has the effect of protecting smaller and less effective subcontractors from competition both internally and externally.

The Market

As all competition occurs at the individual ESA level; in order to properly assess Job Futures' application it is necessary to assess it by reference to the individual ESA level rather than the national level.

The structure of the market is weighted against new entrants, which increases the importance of limiting the quantity and degree of restraints on existing Job Network providers.

Conclusive Comments

Job Futures is now a well established, influential and successful market player in the Job Network market. Its model has led to its considerable success. It is suitably positioned to deal with the full consequences of open market competition.

Whether the Job Futures model has had consequent benefits to the public interest is not clear as there is no empirical data or modelling contained within the applications to demonstrate the same. However, the continued existence of the model, or similar model, is highly likely and, therefore, the public interest will not be furthered by the grant of an authorisation or interim authorisation.

Conversely, it is clear that the restraints contained within the model have the effect of shielding subcontractors from competition, and limit the potential of better performing subcontractors to grow both within and without the model.

Further, detriment will likely be suffered to members and our clients in the event an interim authorisation is granted.

Should you have any queries in respect of the above, or should you wish to seek any clarifications on any point raised, please do not hesitate to contact us.

Yours faithfully
KOTT GUNNING

