

16 May 2008

Job Futures Ltd

Supplementary submission in support of application for exemption

Job Futures Ltd notes the terms of the interim submission granted and, in particular, the ACCC's decision not to authorise (at this, interim, stage) a sub contract clause which would enable a sub contract to be terminated on the basis of a sub contractor's tendering for the same or similar service.

A Terms of the sub contract

A.1 Section 22.3

Section 22.3 makes explicit the underpinning requirement of the Job Futures model – that members contracted to deliver a service not tender for that or a similar service while the sub contract is in place. This requirement has not changed in its intent or its implementation since the first sub contracts, which were subject of the ACCC application in 1998.

A.2 Terminating a sub contract

The Job Futures members sub contract is specifically designed to address the unique circumstances of our model. The grounds for termination within the contract period by Job Futures are set out in clause six of the sub contract. They are narrow, and reflect the checks and balances agreed by members and Job Futures Ltd through the consultation process around the sub contract.

Section 7 of the sub contract requires the Board to act in accordance with its Performance Management and Intervention Policy – which sets out a series of steps to provide support to underperforming members and gives them an opportunity to perform. Termination of a sub contract requires a resolution of the Board. A dispute resolution process is set out in the sub contract.

The sub contract does not explicitly contain a provision which enables a sub contractor to terminate. This reflects the terms of the Head contract which, similarly, require the services to be delivered on a continuous basis throughout the term of the contract and a transition period.

In practice, on any occasion that an organisation has indicated that it is no longer willing or able to deliver a sub contract, Job Futures has released that organisation from the sub contract. No organisation to date has done this because of a desire to

tender outside the organisation. The company is currently considering inclusion, in the next sub contract, of a clause that would enable either party to terminate in the first two years of a contract with at least six months notice. The implications of a clause along these lines, or an alternative (eg. 6 year sub contracts), will need further review by the company and its members. In particular, it is unclear whether the problems identified at C.2 below can be resolved.

At present, sub contractors can resign from membership at any time at which point Job Futures can elect to terminate the sub contract (clause 10). Job Futures is obliged, under its contract with DEEWR, to continue to deliver the relevant service. In order to do this it may seek to identify an alternative sub contractor or ask the organisation to continue to deliver on different terms.

B Job Futures model makes a positive contribution to competition and diversity in the sector

B.1 Job Futures model enables the benefits of incumbency to be shared

We have elsewhere shown that entry into the Job Network for new players is very difficult. Incumbency, experience and demonstrated performance are critical success factors for organisations with a sustainable presence in the Job Network market.

Job Futures relies on being able to tender with a core group of experienced, high performing providers to keep our business and to lend the value of our network to new providers to enable them to enter the market. A number of new organisations have come into Job Network because they tendered as part of Job Futures. It is highly unlikely they could have mounted a credible case without that linkage. They, in effect, ‘borrow’ the experience and performance of others in the Job Futures network.

The partnership that underlies the Job Futures model can be illustrated by reference to the way in which the organisation responds to requests for tenders for Job Network. Requests for tender for Job Network have required tenderers to demonstrate their capacity in the following areas:

1. Performance and experience
2. Strategies for delivery
3. Local linkages and experience

Tenders are submitted where Job Futures has identified (through an internal merit selection) a member with the capacity to deliver.

In addressing section 1, particularly where a proposed sub contractor has not delivered Job Network before, the tender relies on the overall performance and experience of the organisation in delivering these services at the ESA, Labour Market Region and National level. The most relevant experience is that in or near the specific location – which is why retaining a ‘foothold’ in a particular region is so critical. The tender submission also includes the experience and skills of the sub contractor relevant to the service. However evidence of the outcomes of past Job Network

tenders demonstrates that it is experience and performance **within** the Job Network that is most highly valued by DEEWR.

In addressing section 2, Job Futures articulates its national strategies for delivery of contracts. We draw on the combined experience over 10 years of sub contractors of delivery of these services, as well as our analysis and research of ‘what works’. Most content is national, although local sub contractors contribute to ensure that the model is tailored to suit local community needs.

In addressing section 3, Job Futures relies heavily on the local experience, networks and knowledge of its sub contractors.

Job Futures future capacity to secure tenders relies on its experience and track record in delivering contracts both across the country and in particular locations. It relies on going into the tender with a group of strong, experienced sub contractors in each area for which we bid.

B.2 Job Futures model ameliorates the consolidating tendency in the market

When the initial Job Network contracts were put out to tender, over 1000 organisations applied. From an initial group of over 250 that were contracted, the provider base has become smaller:

Employment Services Contract 1 (at Feb 2000)	Employment Services Contract 2 (from 2000-2003)	Employment Services Contract 3 2003-2006	Employment Services Contract 2006-2009
262	196	109	99 (current)

From available records it appears that only 9 new entrants have come into the Job Network market while over 100 have exited. However, under the auspices of the Job Futures model, 9 sub contractors, new to Job Network, have been able to enter the market.

It should be noted that the tenders for ESC3 contracts 3 and the current contract were not full tenders. 60% of ESC 2 providers were offered invitations to treat – only 40% of the market was put to tender. In 2005, 5% of the market was put to tender, attracting 112 bids. In 2007 another 8% of the market was put to tender, attracting 77 bids. In other words, a decline in provider numbers has occurred against a backdrop of strong competition for available business and most contracts being ‘rolled over’ rather than put to tender.

Over the last five years the average number of ESAs delivered by a single provider has increased from 4-5 to 7-8.

	2003 ¹	2008 ²
Single ESA	40	26
2 ESAs	20	25
3-4 ESAs	16	13
5-6 ESAs	17	11
6-8 ESAs	11	17
9-12 ESAs	3	2
13-16 ESAs	4	3
17 or more ESAs	4	6

Most JN sub contractors within Job Futures operate JN in only one ESA. The number of providers in the market operating in more than one Labour Market Region and/or more than one State has also increased over the ten years of the contract.

Significant mergers and acquisitions have occurred over the last year. Angus Knight Pty Ltd, the parent body of Jobfind, has purchased Work Directions as well as smaller organisations like Pegler Personnel and Your Employment Solutions. While recent market share information is not available, based on 2003 data this would make this the second largest provider of Job Network services. PVS have recently announced a merger with IPA and IPC, again creating a very large for profit provider. Large international providers are also showing interest in the market (eg A4e) *facilitated by the Australia/US Free Trade Agreement*. Job Futures model offers small-medium size organisations attempting to address these changes, a viable alternative to merging.

In September this year, the Government will open the whole employment services market to tender for the first time since 1999. The broad architecture of the new contracting arrangements has now been released, with a discussion paper due on 16 May 2008. The contracting arrangements will require providers to deliver a range of services that are currently delivered through a number of different programs. Smaller, specialised providers will find it hard to put forward a competitive bid in this environment unless they are part of larger consortia or sub contracting arrangements. Indications are that Government both anticipates and will encourage more collaborative arrangements within providers as part of this model.³

Job Futures model aims to secure an ongoing role for smaller providers in a changing market. It does this by enabling organisations to pool their financial and intellectual resources so that the strengths and capacities of larger organisations can be replicated

¹ Note that this chart has been prepared from published performance information. Because of the way that it is published, some slight inaccuracies may have arisen in the calculations with providers trading under different names in different locations counting as two providers rather than one.

² Where mergers have taken place since 2003 and this information is publicly available this has been taken into account. For example PVS/IPA/IPC are counted as one, as are Jobfind/Work Directions/Your Employment Solutions.

³ The UK employment services market is also heading in this direction. See the Freud report commissioned by the UK Department of Work and Pensions.

<http://www.dwp.gov.uk/publications/dwp/2007/welfarereview.pdf>

within our model. In the context of increasing consolidation and competition from larger providers (including international providers) these arrangements are more critical today than ever.

B.3 Job Futures supports community organisations to deliver

One of the public/community benefits of Job Futures' model is its ability to enable local organisations to deliver and retain the value of the contract in the community. As the table above illustrates, many providers operate across a significant number of areas. The value from their contracts does not stay in the local area. Nor is there an ongoing contribution to the sustainability and capacity of organisations and leaders in that community. Job Futures model supports those local people to deliver so that they can reinvest any benefits in their community.

The importance of Job Futures Ltd model is illustrated by our involvement in remote Australia. Job Futures is the largest provider of employment services under the Remote Services Funding Deed. We sub contract local organisations to deliver. In most locations these are local Aboriginal owned and controlled organisations⁴. Building the capacity of these organisations to deliver effective services in their own communities increases the chance that local people will engage, and has spin off effects for the wider services delivered by those organisations. It should be noted that, while a number of Aboriginal organisations were initially contracted by DEWR to deliver Job Network services, it appears that the only ones that have survived are those sub contracted by Job Futures Ltd.

C The need for the restriction

C.1 Critical mass of contracts and experience

The services provided by Job Futures Ltd to support effective delivery of contracts are outlined in the earlier submission. Provision of these services on a cost effective basis relies on a critical mass of contract value. Significant reduction in the value of contracts held by Job Futures would mean that services currently provided would be reduced.

Loss of contracted business impacts on the crucial mass of contracts that Job Futures Ltd needs to deliver support services to its members. Particularly if those organisations exiting the organisation were medium-large contract holders, the sustainability of the model would be at risk.

C.2 Protection of confidential information

Job Futures requires its sub contractors to deliver programs in accordance with Job Futures service delivery models and methods (clause 5(c)). It also requires its members to participate in meetings and workshops aimed at identifying good practice

⁴ They include: Tangentyere Job Shop; Wana Ungkuntja; Julalikari Aboriginal Council; Thamarrurr Aboriginal Council; Wunan Foundation; Kullarri Employment Services.

and ensuring that this is adopted across the network (Clause 5 (c)(iii)-(v)). The model is founded on shared strategies and practices built over ten years of experience.

The idea that an organisation that is a member of Job Futures can tender outside the network undermines one of the critical strengths of the organisation and one of the things that makes it successful. Member organisations are able to work together to solve performance issues, share their problems and look at how others solve them. They do this in the knowledge that other members will not use the information shared within the network to compete in their own right for these contracts. .

Every organisation has access to all performance information across the network – including benchmarking information about specific service innovations. Job Futures' own internal performance information systems are designed to facilitate sharing and do not allow us to deny a particular organisation access to information about another site. Even if we were to make the enormous investment required to change this, DEEWR's systems would not enable us to exclude this access. Any member organisation sub contracted by Job Futures for Job Network could examine the performance data of another member and use this knowledge to tender for their contract. We have a concrete example of a member organisation claiming service innovations developed by the network as their own, despite the protections in the sub contract. Tender documents are confidential and there is no practical way for Job Futures to enforce a contractual provision that limits use of Job Futures material in tenders.

If member organisations were to see others in the network not as part of the same organisation but as competitors, they would be highly likely to leave Job Futures as soon as they are able in order to protect their own contracted business from encroachment of others within the network. They would do this not because they did not see the value of what a network like Job Futures can provide, but because that value rests, intrinsically, on a guarantee that members of the network will not use competitive information against each other. If this guarantee is lost, many organisations will determine that, in order to protect their position from other members, they need to exit the organisation.

C.3 Incumbency value lost if members exit after one period of high performing contract delivery

If organisations can use Job Futures to get into the Job Network market, perform well and then tender on their own, ongoing the Company has no base upon which to tender effectively either to retain that contract or to secure a place for new organisations in the market.

Employment services contracts are generally entered into for a 3 year period, with possibility for extension. In order to harness the value of its successful entry into an area, Job Futures needs to be able to retain that presence for at least the initial period (3 years plus any extensions) and a subsequent period (assuming that the sub contractor has performed well over these periods).

One of Job Futures critical objectives – to assist new entrants – will not be able to be achieved if sub contractors are allowed to exit after one period of successful

performance.

C.4 Perception of model in Department's eyes

The credibility of Job Futures Ltd as an organisation rests on its ability to operate coherently and to provide some assurance to the Government that the basis upon which it tenders is likely to remain throughout the contracting period.

Entry and exit of sub contractors could significantly damage the organisation in the eyes of its funding body. It raises questions about the capacity of the organisation to protect its confidential information and that of the Department from misuse.

C.5 Reasonableness of the extent of the restriction

C.5.1 National versus local

22.3 extends to competition anywhere in the country, reflecting the nature of our sector and our organisation. DEEWR contracts providers at a national level and then prescribes market share in particular locations.

Competition is national in that:

On a national basis, DEEWR ranks all sites against all other sites and allocates a 'star rating' based on the percentile ranking of each site as against all others.

Competition between providers occurs on an ongoing basis throughout the contract to improve the national ranking at site and ESA level. Sites with a high national ranking are eligible to be allocated additional market share, while sites with a poor national ranking face the possible loss of business share.

At tender, providers can tender to deliver services anywhere in the country based on their experience and performance.

The threat to Job Futures organisation sustainability is as great whether a sub contractor uses its performance as part of our network and the networks confidential information to tender in its backyard or on the other side of the country.

C.5.2 Effect on sub contractors of decision to withdraw

Any suggestion that if a sub contractor member resigned and Job Futures decided to terminate the sub contract, this would be catastrophic for the member organisation should be taken in the context of the overall nature of the sector in which we work.

It is a feature of our sector that any provider has to manage the risk of loss of a whole contract at certain times and that this will impact on staff and clients. This is the nature of contracting with government, particularly in social service delivery. Contracts may be lost because an organisation fails to win at tender. There is no guarantee that good performance will secure an ongoing right to deliver that program or service, deliver it at the same scale or in the same locations.

In its review of the Job Network, the Productivity Commission noted that: “at the end of the contract period, business risk climbs sharply as providers again bid to retain their rationed capacity...Based on the experiences of the first contract, many agencies are not successful in their bids for subsequent contracts, lose their presence in some regions or face abruptly reduced market share”⁵

Head contracts do not provide certainty within the life of the agreement. For example clause 37 of the Job Network contract provides that:

“DEWR may at any time by notice to the Provider, terminate this Contract in whole or in part or reduce the scope of one or all of the Services without prejudice to the rights, liabilities or obligations of either Party accruing prior to the date of termination or reduction. The parties agree that this clause 37 may be used to remove one or more of the Services under this Contract.”

The clause goes on to state that, in the event of termination or reduction, DEWR will only be liable for fees for services delivered to that point and to any actual costs incurred by the provider.

The Employment Services Funding Deed provides, at clause 7 that:

“Payments under this Deed are comprised of funds or fees or both. Subject to sufficient funds of fees being available for a programme, and compliance by the Funding Recipient to DEWR’s satisfaction, DEWR will provide the Funding Recipient with the fees or funds at the times and in the manner specified in the Specific Conditions.”

Government policy can mean the abolition of whole programs part way through a contract period (as occurred with the recent closure of CDEP in the Northern Territory) and the loss of some or all of a provider’s revenue base.

In this context, the Job Futures sub contract is not exceptionally onerous. Any organisation can resign from membership at any stage, triggering a renegotiation or cancellation of the sub contract. This would enable that organisation to tender against Job Futures, but it would also enable Job Futures the opportunity to seek to subcontract a new community based organisation to take on that contract and to ensure that the organisation leaving the network was not unfairly advantaged by having access to information about Job Futures performance, strategies and delivery models. It is likely that the organisation would have to wait until the next tender to re-enter the market in their own right. However this circumstance would not be dissimilar to others contemplated by providers in this sector all the time – the risk of termination by the Government, the risk of policy change, the risk of losing in a tender environment. The chief difference is that the decision would be made of the organisation’s own volition rather than by the Government or Job Futures Ltd.

⁵ Productivity Commission, Independent Review of the Job Network, Report Number 21, 3 June 2000. p11.17

Of Job Futures members very few rely on Job Futures sub contracts for more than 50% of their revenue. Job Futures encourages organisations to maintain a diverse funding base – although this is clearly a decision for each organisation’s management and Board.

While the largest program in the suite of Commonwealth government funded employment services is Job Network, it is not the only source of funding for community based non profits in the employment and related services arena. Programs commonly delivered by community based non profits, including those in our own network, include: the Community Work Co-ordinator program (CWC), JPET, PSP, Local Community Partnerships, Australian Apprenticeship Centre, Language Literacy and Numeracy Program, Community Development and Employment Program, Structured Training and Employment Program, State funded employment and training programs (e.g. Community Jobs Program, State funded training places, Links to Learning) as well as fee for service training.