

18 July 2008

Authorisation no A91084 & A91085
Job Futures Ltd

Applicant comments on Draft Determination

1. General

Job Futures welcomes the ACCC's findings in relation to the public benefits achieved through Job Futures collaborative model. We are pleased that the importance of a diverse sector is acknowledged and that the capacity of our model to support the entry of community based organisations into the sector is reflected.

The ACCC has also acknowledged that the non compete arrangements that are proposed have been developed in an attempt to secure the ongoing viability of our model through ensuring a critical mass of organisations and protecting the shared knowledge of our network.

In our view the ACCC has understated the importance of the non compete arrangements to the long term sustainability of organisations like Job Futures Ltd.

In this submission we make comment on some particular areas of the draft Determination and restate the importance of protecting the value of the network.

2. National versus local competition

The draft Determination states at 6.20 that the primary relevant area of competition is at the ESA level.

Job Futures Ltd submits that competition occurs at a number of levels and it would be wrong to argue that the national level is insignificant.

At the ESA level, providers may be able to secure additional contracted 'market share' (share referrals of clients who sign up within the ESA) if they are able to get a higher star rating than other organisations in the ESA. They may also be able to attract more clients to their services with better quality services – although this is capped and, in fact, the number of clients that actively choose their provider is relatively small.

However star ratings do not reflect performance within the ESA, but performance against all other Job Network sites across the country. It is possible to have an entire ESA with 4 star providers or with 2 star providers. Where an organisation has a 2 star ranking DEEWR may cancel the contract to deliver at that site and call an open tender. It is the national competition to achieve star ratings which is important to the prospects of winning future contracts rather than performance against local providers.

In the tender process it is true that only those organisations that have indicated an interest in delivering the program in a specific area are ranked against each other in the procurement process for that area. However their capacity to deliver includes an assessment of the providers national service delivery strategies and of their performance at the local, LMR and national basis.

While competition does occur locally particularly in the short term, in considering the sector as a whole competition is national.

3. A member wishing to exit needs to breach the contract

The current sub contracting arrangements do not include an explicit clause that would enable an organisation to give notice that they wish to terminate the sub contract. As stated by the ACCC, this means that an organisation that wishes to exit the sub contract before its expiry, on the face of it, could only do so by triggering a breach of the contract.

This reflects the requirements of the head contract. Under the head contract the contractor (Job Futures Ltd) must deliver the whole of the contracted service for the full term¹. Even where there is a change in circumstances which make it non viable, Job Futures Ltd cannot exit the contract. In practice, if an organisation wishes to exit the sub contract early, Job Futures does everything it can to accommodate this. This has occurred in East Sydney and in Bendigo where, for different reasons, the sub contracted entities wished to withdraw from the sub contract and Job Futures was able to make other arrangements.

Unless there is a change in the head contract which would allow organisations to give notice that they no longer wish to deliver the service in specific locations, it is not practical to have a general right for sub contractors to terminate.

The Board's policy where an organisation wished to resign from membership in order to pursue a tender outside Job Futures Ltd, is to allow this provided sufficient notice is given prior to the tender period to enable a new sub contractor to be put in place to deliver. The Board would also consider renegotiating the sub contract so that the organisation continues as a sub contractor, but on a commercial basis.

4. Arrangements need to protect the interests of Job Futures Ltd and its member organisations

At 6.82 the Commission refers to a comment that if a member organisation's sub contract was terminated it would limit that organisation's chance of success in the next tender.

¹ Contracts can be sold/assigned to another organisation with DEEWR approval. The contract is not divisible - an ESA cannot be parceled off and sold - the whole of the contract in all of the areas must be assigned.

This is correct to the extent that incumbency is an asset to any provider seeking a contract in a tender process. This applies equally to Job Futures Ltd. If Job Futures Ltd is forced to continue to sub contract a specific organisation in an area and that organisation has already signaled its desire not to continue as part of the Job Futures arrangements, Job Futures Ltd is denied the opportunity to establish a track record with another local member organisation that does wish to continue.

The organisation which intends to depart is effectively blocking the pursuit by Job Futures Ltd and its members of their interests in the contract which has been won for that area. Job Futures Ltd is denied the capacity to use the value of its incumbency to support entry of a new provider to the sector and to retain the shared value of that contract within its member network.

In the long term, should organisations decide to leave and deny Job Futures Ltd the ability to bring in new sub contractors in the area, Job Futures Ltd may find itself effectively locked out of key Labor Market Regions where it has been delivering for many years, and has other members but those organisations have been unable to benefit from the contracts held by Job Futures Ltd in those areas.

Job Futures sustainability depends on retaining a critical mass of contracts and being able to contract members to deliver these. In many locations we have more than one member organisation which is capable and interested in delivering, and there are more potential members that would make a great contribution if they were able to secure a contract through Job Futures Ltd.

It may be possible to identify a way of mitigating the loss for the organisation that wishes to depart (eg. by negotiating a continuing contract for some but not all of the contracted business) but it should not be expected that an exiting organisation should be able to retain the full value of the sub contract.

4. Comparison with similar organisations

The ACCC has referred to the arrangements of two organisations in our sector that also operate on the basis of collaborative tendering. Both have acknowledged the importance of retaining a critical mass of providers and that the lack of a 'non compete' clause means that their arrangements are fragile.

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Looking at publicly available information it appears that Job Futures contracts are performing better on average than those of CSSA or Ostara. Job Futures is also larger than either of these organisations.

In CSSA's most recent Annual Report the risks to its network were highlighted in a commentary on internal processes to strengthen the contractual arrangements binding member organisations:

“A further network meeting was planned for early July 2007 but by the end of 2006-07, it was clear that, despite the risks to themselves and the overall network, some agencies were contemplating withdrawing from the national arrangements and adopting individual local contracts instead.”

The CSSA group has other ties that bind it together through common link to the Catholic Church. Ostara's presence in the Job Network program remains very small and we understand that it has recently moved to substantially increase its contract fees to enable services to members to be improved.

Job Futures non compete arrangements have been critical to its success to date and are important to ensuring a sustainable future. The mere existence of other organisations that do not have these same arrangements in place does not demonstrate that the proposed arrangements are not necessary to achieve public benefit over the long term.

5. Job Futures current information systems

One of the most valued assets of Job Futures Ltd is our information system, which has been developed for use of Job Futures Ltd and its members. Job Futures has developed a customised web based performance information system that enables member organisations to:

- monitor their performance against targets and against competitors;
- track individual job seekers to ensure that they are supported to remain in employment;
- access Job Futures service guides, compliance checklists, standard forms, training programs and other support material;
- download performance reports;
- register on line complaints and monitor progress of resolution of complaints;
- benchmark financial performance against other member organisations;
- participate in on line forums and discussions.

The system has been developed over 6 years by an inhouse team of developers and has been built on the basis that every organisation should be able to compare their performance with others in the network. Neither Ostara nor CSSA has an equivalent custom built system.

The performance management system has been developed in a way that enables member-sub contractors to view other members performance. There are both practical and strategic reasons for this. In a practical sense it is costly to establish and maintain a system of permissions that allows access to some areas of the web site and not others.

Strategically, members have a critical stake in the performance of other organisations as this can directly affect their own success in tenders and the overall organisational reputation. This is most acute where members share an ESA – but it is also relevant at the LMR and national level. Sharing data enables senior staff in member organisations to review and benchmark their site's data against others. In doing so they are able to gain the benefits of being part of a larger organisation within our JF model.

These systems represent a substantial investment by Job Futures and its members. They represent considerable value in the organisation and would need to be reworked to accommodate internal potential competitors. The loss of capacity to confidently share information through our web site would impede the effectiveness of our model and particularly disadvantage members in shared ESAs.

6. Confidential strategic information

At 6.63 – 6.65 of the draft determination some analysis is provided of Job Futures argument that the proposed contracting arrangements are necessary to protect confidential strategic information.

As stated above, the Job Futures on line information is integral to the successful operations of our services and stopping sub contractors accessing this site is not straightforward or necessarily desirable. It would limit the capacity of Job Futures Ltd to monitor performance in key areas and may compromise some aspects of performance of the contract.

Our sub contracting arrangements require members to use specific tools and resources which include the on line complaints system, the post placement support tool and the standard forms and training programs. We cannot limit access to these because to do so would force a breach of our commitments to the Commonwealth made through the tender process.

It is true that there is high mobility of staff within our sector and this means that staff may talk about the approach taken by Job Futures in contract delivery.

However the confidential strategic information that Job Futures Ltd seeks to protect is in our tools and resources (eg training programs, checklists) and in the advice and guidance that we give to sub contractors in order to assist them to manage their organisations to achieve performance.

Job Futures Ltd has a performance management team comprising a Manager, a business analyst and 5 Member Performance Consultants. This team analyses performance trends across programs and develops strategies to maximise performance drawing on best practice in our network and other sources. The team work with each site manager to identify local targets and build a plan for the site. Contact is generally minimum fortnightly. This type of strategic work represents a critical investment by members as a whole (through their contract and member fees and their contribution of their own

knowledge of what works) into each individual sub contractor. It is not readily lost through staff churn.

Job Futures Ltd can and does seek to protect its intellectual property and strategic information base through confidentiality clauses in its sub contracts. In theory these should protect Job Futures from an organisation using information, advice and claiming tools and resources as their own in any future tender. In practice, however, it is almost impossible for Job Futures to enforce these clauses because of the difficulty of ascertaining whether an organisation has breached them. The only way we are able to verify a breach is in the context of court action which enables tender documents to be subpoenaed.

7. Points of clarification in ACCC's Draft Determination

The Interim Authorisation provided the capacity for Job Futures Ltd to seek binding commitments from member organisations wishing to participate in a tender that they would not tender directly on their own behalf for that Employment Contract. Job Futures seeks the inclusion of this aspect of the authorization in the final determination and also that it apply not just to organisations submitting on their own behalf, but submitting as part of a consortium or sub contractor to another provider.

The draft determination gives some support to arrangements that prevent sub contracted organisations from competing for a period of time beyond an initial contracting period. Implicitly this would extend to enabling arrangements to be put in place which prevented organisations from tendering to deliver the same or similar program during the period in which the Job Futures sub contract was on foot. This issue has arisen and Job Futures seeks clarification of the matter in the final determination.

8. Minor Corrections

2.23 The membership fee is set by the Board. For the 2008/9 calendar year it has been set at \$4,800 GST inclusive for all members. The entrance fee of \$5,500 remains. The Board may waive some or all of these fees if necessary.

2.49 The tender in relation to the 2003-2006 Employment Services contract was prepared in October and November 2002 and submitted on 5 December 2002. Certainly at the point that members agreed to participate in that tender the Authorisation was on foot.

2.50 The matter has now been transferred to the Federal Court.